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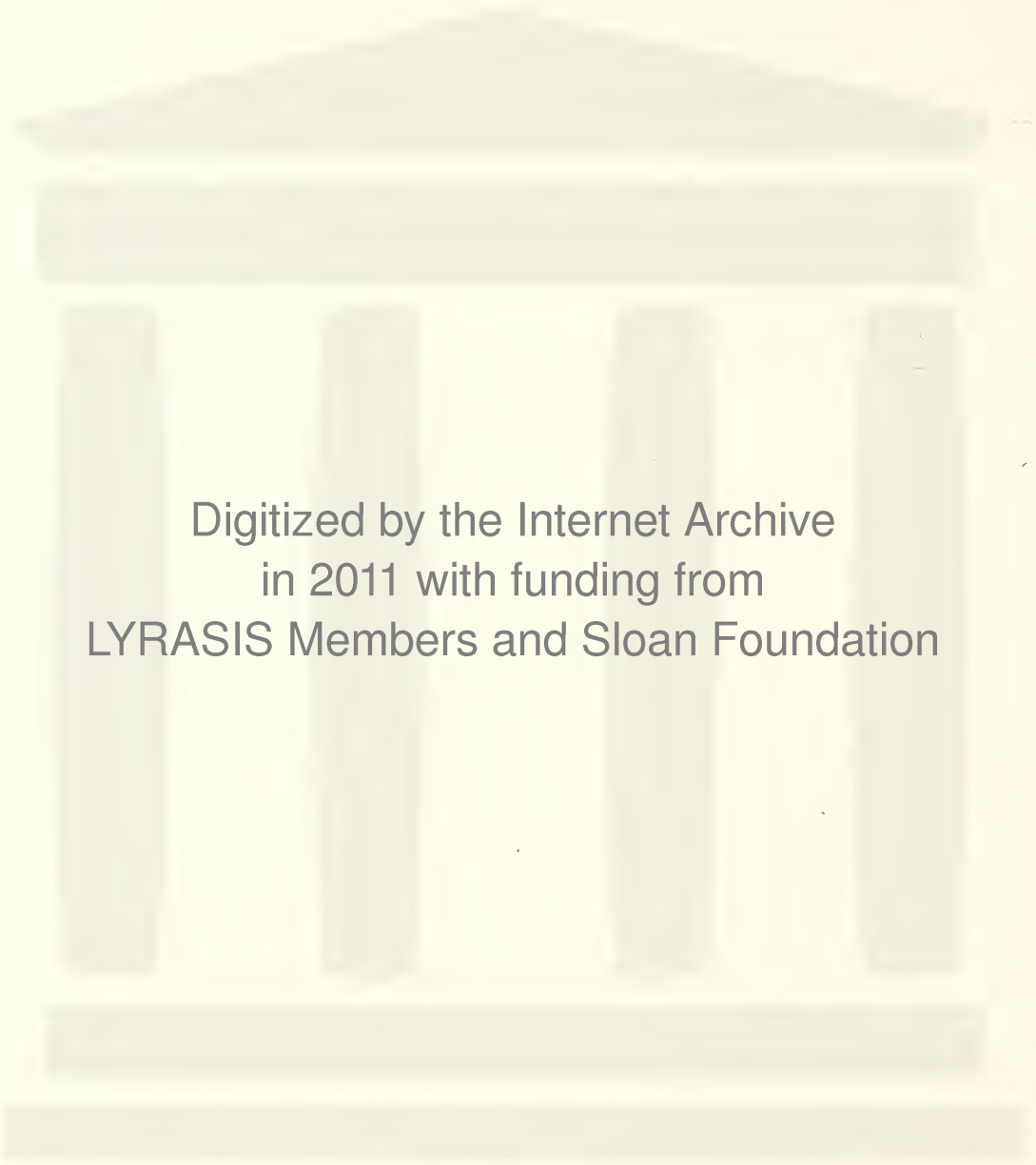

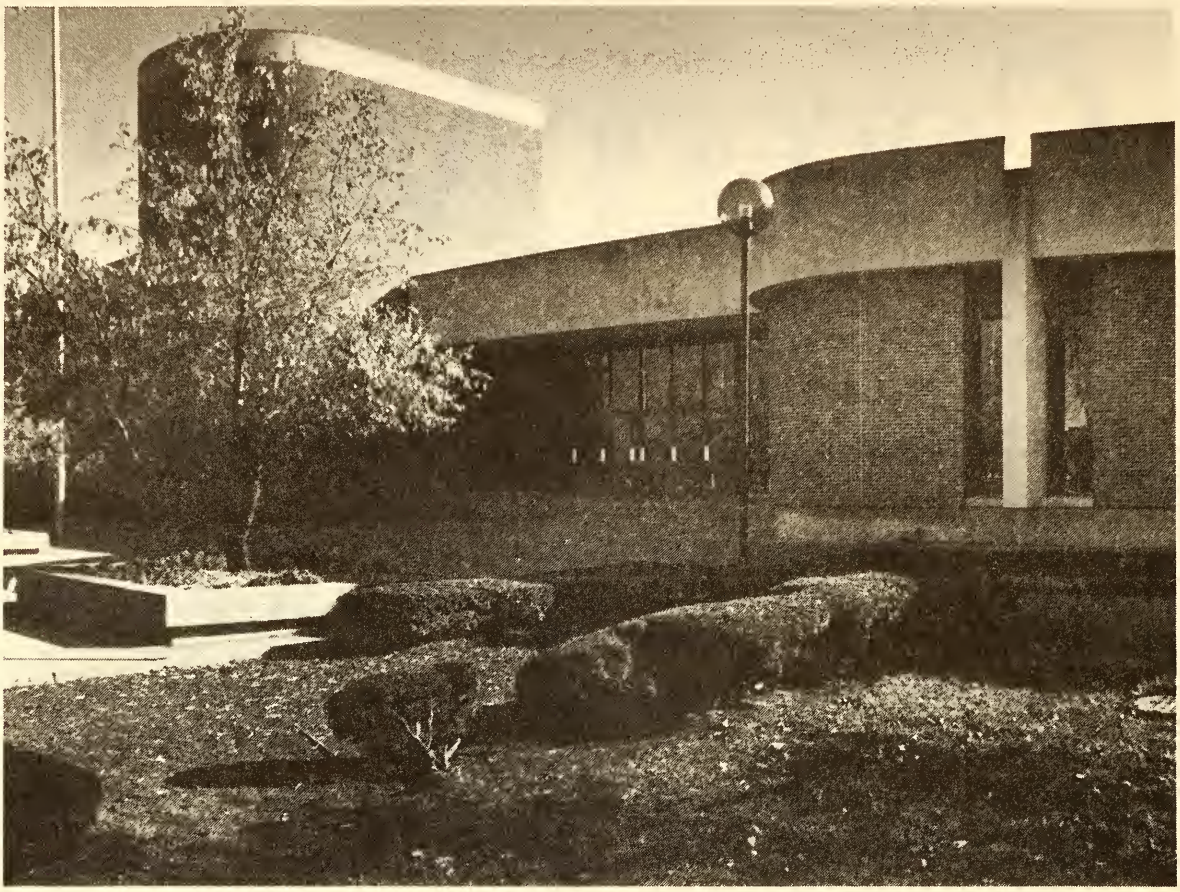

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ARTICLES

A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence

EDWARD J. IMWINKELRIED*

Dean Calabresi has written that the present era is the "Age of Statutes." In his words, American law has undergone "statutorification."[1] Although at one time our law consisted primarily of common-law doctrine, statutes have now become the dominant source of American law.[2] This trend is certainly evident in the field of evidence law. Until recently, the American law of evidence was largely decisional in character; indeed, the decisions were so numerous that it took one of the most monumental common-law treatises, the multi-volume work by Dean Wigmore,[3] to synthesize the case law. Until the 1970's, comprehensive evidence codes existed in only a handful of states.[4] However, in December 1974, Congress approved the Federal Rules of Evidence. The Rules took effect in 1975, and their influence has spread. Thirty-five states have adopted evidence codes modeled directly after the Federal Rules.[5] The task facing the federal and state courts in those states that have adopted these evidence codes is the interpretation of the Rules.

In a number of cases, the United States Supreme Court has undertaken that task.[6] In these cases, the Court has adopted a moderate textualist approach to the construction of the Rules.

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* Professor of Law, University of California at Davis; former Chair, Evidence Section, American Association of Law Schools; B.A., 1967, J.D., 1969, University of San Francisco.

1. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

2. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 569 (1988).

3. RONALD L. CARLSON, EDWARD J. IMWINKELRIED & EDWARD J. KIONKA, EVIDENCE IN THE NINETIES 21 (3d ed. 1991).

4. *Id.* at 21-23.

5. *See generally* GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987) (4 vols.). A version of the Federal Rules will soon go into effect in Indiana.

6. United States v. Salerno, 112 S. Ct. 2503 (1992); United States v. Zolin, 491

In adopting the moderate textualist approach, most of the current Justices have rejected the traditional, legal process approach to statutory construction. Hart and Sacks, legal scholars, had been the leading advocates of that approach.[7] They viewed each piece of legislation as purposeful and rational.[8] They presumed that legislators are reasonable individuals acting in good faith to pursue social purposes.[9] If so, legislators would presumably endeavor to produce legislative history that accurately sheds light on the meaning of the statutory language they enact. Under this traditional approach in construing a piece of legislation, courts were not only permitted to resort to extrinsic legislative history, but were also encouraged to ascribe great weight to such material in the interpretive process. Indeed, according to the legal process school of statutory interpretation, these materials may readily trump the seemingly plain meaning of the statutory text.[10]

Many of the current Justices have been persuaded by the law-and-economics scholars' critique of the legal process approach to statutory interpretation. Those scholars believe that the legal process approach suffers from political naivete. They advocate the so-called textualist approach which conceives of statutes as compromises shaped by expediency.[11] In effect, when the legislature adopts a statute, it strikes a deal with the affected interest groups.[12] In the words of one court, a statute is "the eventual product of . . . competing political currents."[13] "The [legislative] body as a whole . . . has only outcomes."[14] The compromised statutory text is voted on, and that alone has the force of law. In construing a piece of legislation, the judge's task is to attempt to discern "the lines of [the] compromise" codified in the statutory language.[15]

Law-and-economics scholars are frankly skeptical of the legislative history extrinsic to the statutory text.[16] The most frequently used history

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U.S. 554 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504 (1989); Huddleston v. United States, 485 U.S. 681 (1988); United States v. Owens, 484 U.S. 554 (1988); Bourjaily v. United States, 483 U.S. 171 (1987).

7. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1144-47 (tentative ed., Cambridge, Mass. 1958).

8. Eskridge & Frickey, *supra* note 2, at 571.

9. *Id.* at 575-76.

10. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 628 (1990).

11. William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 703, 710 (1987).

12. *Id.* at 703-05.

13. Woodland Joint Unified School Dist. v. Commission of Professional Competence, 4 Cal. Rptr. 2d 227, 241 (1992).

14. Frank H. Easterbrook, *Statutes' Domain*, 50 U. Chi. L. Rev. 533, 547 (1983).

15. Richard H. Posner, The Federal Courts: Crisis and Reform 289 (1985).

16. United States v. Smith, 795 F.2d 841, 845 (9th Cir. 1986) (the court should

is a committee report,[17] but neither the legislature as a whole nor the committee votes on the report. The likelihood is that many, if not most, of the legislators have not even read the report. "[C]ommittee staff members and lobbyists often write [these documents]."[18] Rather than attempting to accurately describe the collective sense of the committee or legislature, the staff member or lobbyist may be trying to manipulate the legislative history.[19] The language may have been inserted in the report for the very purpose of misleading a court into giving a special interest group a victory by way of statutory construction that the full legislature would have refused to grant.[20]

Although the Justices are sympathetic to these criticisms of the legal process approach to statutory interpretation, they have balked at embracing the most extreme textualist position. The extreme textualists contend that the court should not even consult legislative history material until the court has first exhausted all possibilities of parsing a plain meaning from the statutory text. The court may turn to the extrinsic material only if the statutory language has no plain meaning on its face.[21] Strict textualists[22] believe that as the first step in statutory

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exercise caution in looking at legislative history), *cert. denied*, 481 U.S. 1032 (1987); United States v. Worstine, 808 F. Supp. 663 (N.D. Ind. 1992) (reliance on legislative material is precarious, and the court should view such material with circumspection); *In re* Grand Jury Investigation (90-3-2), 748 F. Supp. 1188, 1200 n.16 (E.D. Mich. 1990) ("reliance on legislative history as a means of divining Congressional intent is a dubious enterprise, one to be taken cautiously . . . ."); Bresgal v. Brock, 637 F. Supp. 271 (D. Or. 1985) (when the court consults legislative history, the court should take the step cautiously), *aff'd in part, mod. in part*, 833 F.2d 763 (9th Cir. 1987).

17. Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 299, 304 (1982).

18. Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1005 (1992).

19. ESKRIDGE & FRICKEY, *supra* note 2, at 710, 715-17.

20. Hirschey v. F.E.R.C., 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

21. Prisco v. Talty, 993 F.2d 21, 24 (3d Cir. 1993); United States v. Derr, 968 F.2d 943 (9th Cir. 1992) (the language of the statute is both the starting and ending point of interpretation when the meaning is clear); United States v. Green, 967 F.2d 459 (10th Cir. 1992) (if the statutory text has a plain meaning, the inquiry ends), *cert. denied*, 113 S. Ct. 435 (1992); Foster v. Chesapeake Ins. Co., 933 F.2d 1207 (3d Cir. 1991) (the court should not draw upon legislative history unless there is an ambiguity), *cert. denied*, 112 S. Ct. 302 (1991); United States v. Evinger, 919 F.2d 381 (5th Cir. 1990)(if the statutory text is unambiguous, the court should not look beyond the express terms of the statute); *In re* Moore, 907 F.2d 1476, 1478-79 (4th Cir. 1990) ("Legislative history is irrelevant to the interpretation of an unambiguous statute"); Franklin Savings Asso. v. O.T.S., 821 F. Supp. 1414 (D. Kan. 1993); Koch v. Shell Oil Co., 820 F. Supp. 1336, 1340 (D. Kan. 1993) ("when the words of a statute are unambiguous, then the judicial inquiry as to legislative intent begins and ends with the language of the statute"); McDonald's Corp. v. Wilson, 814 F. Supp. 935 (D. Or. 1993); United States v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1992) ("[B]efore it can reach legislative history, the

construction, the judge ought to inquire whether the language bears a clear or plain meaning.[23] Finding a lack of plain meaning is a condition precedent to considering extrinsic material.[24]

Although the strict textualist approach is popular with some of the lower courts, the Supreme Court has embraced a more moderate version of textualism; as under the legal process tradition, the Court routinely considers extrinsic legislative history material.[25] However, the Justices otherwise have invoked a generally textualist approach to interpretation.[26] The lead opinion in each of the Supreme Court's opinions construing the Federal Rules of Evidence uses the expression "plain" meaning.[27] The majority has said in so many words that the Rules should be interpreted according to their plain meaning unless a literal construction would result in an absurd, perhaps unconstitutional, result.[28] In short, the presumption is that statutory language is to be given its plain meaning.[29] Albeit rebuttable, the presumption is a strong

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court must conclude that the plain language of the statute is ambiguous"); Harrisburg v. Franklin, 806 F. Supp. 1181 (M.D. Pa. 1992); Nunn Bush Shoe Co. v. United States, 784 F. Supp. 892 (U.S.C.I.T. 1992); Federal Deposit Ins. Corp. v. Haddad, 778 F. Supp. 1559, 1566 (S.D. Fla. 1991) ("only when a statute is inescapably ambiguous . . . .").

22. ESKRIDGE & FRICKEY, *supra* note 2, at 571.

23. Johnson v. Town of Trail Creek, 771 F. Supp. 271 (N.D. Ind. 1991).

24. Farr v. United States, 990 F.2d 451, 455 (9th Cir. 1993); Guilzon v. C.I.R., 985 F.2d 819 (5th Cir. 1993); Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207 (3d Cir. 1991).

25. Government of Virgin Islands v. Knight, 989 F.2d 619, 633 (3d Cir. 1993) ("The plain meaning rule . . . is not absolute. A court may consider persuasive legislative history that Congress did not intend the words they selected to be accorded their common meaning. Watt v. Alaska, 451 U.S. 259, 266 . . . (1981)"); *In re* Brichard Securities Litigation, 788 F. Supp. 1098, 1101 (N.D. Cal. 1992) ("recent Supreme Court cases suggest that in all questions of statutory interpretation, a court may examine the legislative history in order to avoid an 'unreflective' reading of a statute"). *See also* Greenwood Trust Co. v. Commonwealth of Mass., 971 F.2d 818, 825 (1st Cir. 1992); Horan v. King County, Div. of Emergency Medical Services, 740 F. Supp. 1471 (W.D. Wash. 1990) (there is no absolute bar to considering legislative history). For example, in its recent decision, Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993), construing Federal Rule of Evidence 702 governing the admissibility of scientific testimony, the Court turned to "[t]he drafting history" immediately after analyzing "the text" of the rule.

26. Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992); Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990).

27. *E.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989); Huddleston v. United States, 485 U.S. 681, 687 (1988); Bourjaily v. United States, 483 U.S. 171, 178 (1987).

28. Jonakait, *supra* note 26, at 761; Sullivan v. C.I.A., 992 F.2d 1249, 1252 (1st Cir. 1993). *See also* United States v. Sheek, 990 F.2d 150, 153 (4th Cir. 1993)("Even if

one,[30] yielding[31] only in extraordinary cases[32] when the legislative history manifests a very clearly expressed[33] contrary intention. Hence, under the moderate textualist view, although the judge may consider extrinsic legislative history material as a matter of course, the material is only a secondary interpretive aid[34] of far less importance and entitled to much less weight[35] than the apparent plain meaning of the statutory text. The text "enjoys preeminence."[36] The net result has been that if a common-law exclusionary rule has not been codified in the text of the Federal Rules of Evidence, the Court has uniformly held that the rule is no longer good law.[37]

While the Supreme Court seems firmly committed to applying a moderate textualist approach in interpreting the Federal Rules of Evidence,[38] in 1992 one highly respected commentator, Professor Weissenberger, questioned the Court's construction of the Rules.[39] Professor Weissenberger not only criticizes the outcomes in particular Supreme Court decisions;[40] more fundamentally, he advances the thesis that the

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the result appears to be anomalous or absurd in a particular case, the court may not disregard unambiguous language") (citations omitted).

29. Lever Bros. Co. v. United States, 981 F.2d 1330 (D.C. App. 1993); *In re* Continental Airlines, Inc., 932 F.2d 282, 287 (3d Cir. 1991); Singh v. Daimler-Benz, AG, 800 F. Supp. 260 (E.D. Pa. 1992); City of Highland v. County of San Bernardino, 6 Cal. Rptr. 2d 346, 352 (1992).

30. Guilles v. Sea-Land Service, Inc., 820 F. Supp. 744, 751 (S.D.N.Y. 1993); Gang v. United States, 783 F. Supp. 376, 380 (N.D. Ill. 1992).

31. Allen v. Card, 799 F. Supp. 158 (D.D.C. 1992).

32. United States v. Knox, 977 F.2d 815, 820 (3d Cir. 1992); Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1213 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 302 (1991); Malloy v. Eichler, 860 F.2d 1179 (3d Cir. 1988); U.S. Football League v. National Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986).

33. RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1460 (11th Cir. 1992); Johns-Manville Corp. v. United States, 855 F.2d 1556 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989). *See also* Cervantez v. Sullivan, 739 F. Supp. 517, 519 (E.D. Cal. 1990) ("[v]ery strong evidence"); Tello v. McMahon, 677 F. Supp. 1436 (E.D. Cal. 1988) (very strong evidence, if not explicit language).

34. *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 782 F. Supp. 481, 484 (C.D. Cal. 1991).

35. United States v. Shriver, 989 F.2d 898, 901 (7th Cir. 1992) ("the legislative history of a statute is of weighty import only when the statute is not clear or when the application of its 'plain language produces absurd or unjust results'").

36. Sterling Suffolk Racecourse Ltd. Partnership v. Burrellville Racing Ass'n, Inc., 989 F.2d 1266, 1270 (1st Cir. 1993).

37. *See generally* Becker & Orenstein, *supra* note 26, at 857; Jonakait, *supra* note 26, at 745.

38. Jonakait, *supra* note 26, at 761-62.

39. Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 Ohio St. L.J. 1307 (1992).

40. *Id.* at 1311 ("untoward ramifications").

Court has erred in applying the normal doctrine of "legislative intent" in construing the Rules.[41] Although Congress' enactment of the Rules was "the terminal point" in the process of the Rules' adoption,[42] Professor Weissenberger argues that the Rules are the product of "a multibranch process in which the subjective intent of the drafters is predominantly traceable to the judicial branch."[43] He believes that by emphasizing the words approved by Congress, the Court has slighted the essential design of the Rules[44]—namely, protecting the judiciary's "substantial inherent discretion in interpreting, expanding upon, and applying the Rules."[45] He asserts that "the preservation or engraftment of additional evidentiary doctrines and principles was not precluded, but rather, specifically contemplated as integral to the structural scheme of the Rules."[46] In other words, even if an exclusionary rule of evidence has no basis in the text of the Federal Rules, in its discretion a court may create the rule[47] and superimpose it on the statutory text.[48]

Professor Weissenberger's article is both thoughtful and thought-provoking. However, in the final analysis, his argument is flawed. The purpose of this Article is to unmask that flaw. Professor Weissenberger's argument amazingly overlooks the central importance of a Federal Rules provision cited nowhere in his article—Federal Rule 402. Once that provision is understood, it will become clear why both Professor Weissenberger's reading of the cases and his policy arguments are unsound.

The first Part of this Article focuses on the underlying error in Professor Weissenberger's position, namely, ignoring Rule 402. Part I reviews historical antecedents of Rule 402, discusses the history of 402's adoption, and mentions pertinent developments after its adoption. Part I concludes that Rule 402 is, to use Professor Weissenberger's expression, the key to "the structural scheme of the Rules."[49] It is Rule 402 that deprives the courts of the power to enforce uncodified exclusionary rules of evidence.

In that light, Part II of this Article turns to some of the more specific lines of argument that Professor Weissenberger presents to support his position. Just as Rule 402 undercuts Professor Weissenberger's basic position, it invalidates his related lines of argument. Part II dem-

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41. *Id.* at 1308-09.
42. *Id.* at 1319.
43. *Id.* at 1309, 1314.
44. *Id.* at 1310-11.
45. *Id.* at 1310.
46. *Id.* at 1330-31.
47. *Id.* at 1311.
48. *Id.* at 1318.
49. *Id.* at 1331.

onstrates that he has misread the leading Supreme Court precedents interpreting the Federal Rules precisely because he has overlooked the role Rule 402 played in those cases. In addition, while agreeing with Professor Weissenberger that the Rules were intended to grant the trial court discretion in administering evidentiary doctrine, this Part explains why the Supreme Court's textualist approach is the best protection for that discretion. As we shall see, historically the principal threat to trial court discretion has been appellate intervention announcing rigid, categorical exclusionary evidentiary doctrines which tie the hands of the trial judges—the very type of intervention from which Rule 402 shields the trial bench.

I. Rule 402 as the Keystone of the Federal Rules of Evidence

When the armed forces adopted their version of the Federal Rules of Evidence in 1980,[50] the version included a provision virtually identical to Federal Rule 402.[51] The Military Rules were accompanied by an official Drafters' Analysis. The Analysis accompanying Rule 402 remarked that "Rule 402 is potentially the most important of the new rules."[52] As the following section will demonstrate, that remark was prophetic as well as insightful. Rule 402 is—and should be—the keystone of the structure of the Federal Rules.

Rule 402 reads:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.[53]

Professor Weissenberger urges that rather than simply focusing on the statutory text approved by Congress, the courts should also weigh "the subjective intent of the drafters" of the Federal Rules.[54] However, if one does so, contrary to Professor Weissenberger's suggestion, the courts will conclude that they no longer possess the power to create[55] uncodified exclusionary rules and superimpose[56] or engraft[57] such rules onto the statutory language.

A well-accepted maxim of interpretation is embodied in the old Latin phrase *expressio unius est exclusio alterius*:[58] if a document provides for

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50. Stephen A. Saltzburg, Lee D. Schinasi & David A. Schlueter, Military Rules of Evidence Manual 1 (1981).
51. *Id.* at 174.
52. *Id.* at 175.
53. Fed. R. Evid. 402.
54. Weissenberger, *supra* note 39, at 1309.
55. *Id.* at 1311.
56. *Id.* at 1314.
57. *Id.* at 1330.

one thing, other things are impliedly excluded.[59] The maxim is frequently invoked in statutory construction.[60] However, the maxim is not confined to statutory interpretation. In the final analysis, the maxim has a common-sense basis.[61] If we can assume that a person chooses her words carefully, what she does not say can be "just as important" as what she says.[62] If she refers to certain items in a class but makes no mention of other items in the same class, the common-sense inference is that she does not intend to include the omitted items. The inference is a logical one whether the writing being interpreted is a statute or a private document such as a contract.[63] The inference is particularly strong when there is an affirmative indication that the person has selected her words carefully[64] rather than hastily.[65] In 1992, in *United States v. Salerno*,[66] the Supreme Court construed the hearsay provisions of the Federal Rules. The Court commented that the very detail of the provisions demonstrated that the drafters had made "a careful judgment"[67] as to which hearsay to admit.

Irrespective of whether we label Rule 402 a "judicial" or "legislative" document, the maxim gives us important insight into the intent of the drafters of Rule 402. Their words specifically list exclusionary rules of evidence based on four sources of law: "the Constitution of the United States, . . . Act of Congress, . . . these rules, or . . . other rules prescribed

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58. A variation of the maxim is *inclusio unius est exclusio alterius*. In one case the translation is "the express mention of one" while in the other case the translation is "the inclusion of one." *See* United States v. Koonce, 991 F.2d 693, 698 (11th Cir. 1993).

59. 2A STATUTES AND STATUTORY CONSTRUCTION § 57.10, at 664 (N. Singer, Sands rev. 4th ed. 1984).

60. *E.g.*, United States v. Koonce, 991 F.2d 693, 698 (11th Cir. 1993); Rylewicz v. Beaton Services, Ltd., 888 F.2d 1175 (7th Cir. 1989); United States v. Goldbaum, 879 F.2d 811 (10th Cir. 1989); *In re* Marriage of Fisk, 4 Cal. Rptr. 2d 95, 100 (1992); Del Mar v. Caspe, 272 Cal. Rptr. 446 (1990); Parmett v. Superior Court, 262 Cal. Rptr. 387 (1989); People v. Melton, 253 Cal. Rptr. 661 (1988); *In re* Edwayne V., 242 Cal. Rptr. 748 (1987); Elysian Heights v. City of Los Angeles, 227 Cal. Rtpr. 226, 231 (1986). *See generally* ESKRIDGE & FRICKEY, *supra* note 2, at 641.

61. United States v. Crane, 979 F.2d 687 (9th Cir. 1992).

62. Mundell v. Beverly Enterprises-Indiana, Inc., 778 F. Supp. 459, 462 (S.D. Ind. 1991).

63. 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 552 (1960).

64. Foy v. First Nat'l Bank, 868 F.2d 251 (7th Cir. 1989)(a carefully drafted statute); Bryant v. Food Lion, Inc, 774 F. Supp. 1484 (D.S.C. 1991) (careful drafting by Congress).

65. Atchison, Topeka & Santa Fe Ry. Co. v. United States, 660 F. Supp. 29 (D. Kan. 1986).

66. 112 S. Ct. 2503 (1992).

67. *Id.* at 2507.

by the Supreme Court pursuant to statutory authority."[68] However, this list contains no mention of a fifth source, namely, case, common, or decisional law. The inference is that the drafters intended to exclude that fifth source. The maxim thus points to the conclusion that Rule 402 precludes the courts from enforcing uncodified exclusionary rules of evidence; case law or decisional authority is *not* a permissible basis for excluding relevant evidence. The predecessors of Rule 402, the history of its adoption, and several subsequent developments all reinforce that conclusion.

A. The Historical Antecedents of Rule 402

Professor Weissenberger correctly points out that a consideration of the Federal Rules' "predecessors" may be helpful in divining the intent of the Rules.[69] He expressly mentions the Model Code of Evidence, published in 1942, and the Uniform Rules, released in 1953.[70] He gives the Code and the Uniform Rules as examples of statutory schemes protective of the trial judge's discretion.[71] Those schemes are undeniably relevant to fathoming the intent of Rule 402, particularly since the Advisory Committee Note to 402 specifically cites similar schemes such as the Uniform Rules.[72] However, his discussion omits the most relevant parts of those statutory schemes. Both schemes included provisions analogous to Rule 402, and both provisions are at odds with Professor Weissenberger's contention that the Federal Rules should be interpreted to preserve the common law power to create and enforce uncodified exclusionary rules.

The American Law Institute promulgated the Model Code, which included Rule 9, a counterpart to Rule 402. In pertinent part, Rule 9 stated that "[e]xcept as otherwise provided in these Rules, . . . all relevant evidence is admissible."[73] The official comment to the Model Code expressed the drafters' intent: "These Rules . . . abrogate the effect of any prior judicial decision contrary to any part of the Rules, and prevail over inconsistent statutory provisions."[74]

The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Rules, which were adopted in Kansas.[75] Like

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68. FED. R. EVID. 402.

69. Weissenberger, *supra* note 39, at 1327-29.

70. *Id.*; CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 22-23.

71. *Id.*

72. FED. R. EVID. 402, Adv. Comm. Note.

73. 22 CHARLES A. WRIGHT & KENNETH GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5191, at 174-75 n.13 (1978).

74. Comment, MODEL CODE OF EVIDENCE Rule 2, quoted in *Id.* § 5199, at 219 n.1.

75. *Id.* § 5191, at 175.

the Model Code, the Uniform Rules contained a provision strikingly similar to Rule 402. That provision—Uniform Rule 7—announced that "[e]xcept as otherwise provided in these Rules, . . . all relevant evidence is admissible."[76] The Kansas drafting committee which embraced the Uniform Rules stated that Rule 7 "wipes out all existing restrictions . . . on the admissibility of relevant evidence."[77] The Advisory Committee Note to Federal Rule 402 expressly cites both the Uniform Rule and Kansas' version of the Rule as comparable provisions.[78]

The same Note prepared by the authors of Rule 402 mentions California Evidence Code section 351 as one of the drafting models for 402.[79] Section 351 proclaims: "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."[80] The statute was drafted by the California Law Revision Commission which used Uniform Rule 7 as its template.[81] The Commission avowed its intent that section 351 would preclude the possibility that "valid restrictions on the admissibility of evidence in addition to those declared by statute will remain."[82]

Given the citations to other statutory schemes in the Note to Rule 402, Professor Weissenberger is correct in urging the courts to look at the "predecessors" to the Federal Rules. However, given close scrutiny, the "structural scheme" of those predecessors undercuts his position. The thrust of the earlier statutory schemes was to reform and simplify Evidence law, in part through the simple expedient of depriving the courts of the power to further complicate it by judicially prescribing uncodified exclusionary rules.

B. Rule 402 Itself and the History of Its Adoption

The link between Rule 402 and California Evidence Code section 351 is more than philosophic. The California Law Revision Commission studied the codification of evidence during the early 1960's,[83] at roughly the same time, Professor Weissenberger notes, that Chief Justice Warren initiated the study of the feasibility of a federal evidence code.[84] At one point, the Advisory Committee drafting the Federal Rules included one

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76. *Id.* § 5191, at 175 n.14.
77. *Id.* § 5192, at 178 n.9.
78. FED. R. EVID. 402, Adv. Comm. Note.
79. *Id.*
80. CAL. EVID. CODE § 351.
81. WRIGHT & GRAHAM, *supra* note 73, § 5191, at 175.
82. 7 CAL. L. REV'N COMM'N, RECOMMENDATIONS PROPOSED AND EVIDENCE CODE 34 (1965).
83. Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129, 132-33 (1987).
84. Weissenberger, *supra* note 39, at 1319.

of the drafters of the California Evidence Code.[85] As previously stated, the California Law Revision Commission explicitly stated that the Code was intended to impliedly repeal uncodified exclusionary rules; and in their Note, the drafters of Rule 402 cited section 351 of the Code as a model for 402. As we shall now see, the context of Rule 402, its accompanying Note, and its legislative history all support the conclusions that the omission of any reference to case law in Rule 402 was purposeful and that this purpose was to deny the courts the rule-making authority which Professor Weissenberger claims the Rules left intact.

To properly interpret a portion of the text of any document—whether a public statute or private writing—the court should consider the entire context of the document.[86] Thus, other provisions of the Federal Rules can shed light on the meaning of Rule 402. As provisions in the same statutory scheme, Rules 501 and 403 form part of the context of Rule 402. Rule 501 specifically authorizes the courts to continue to evolve privilege doctrine by "common law" process.[87] Professor Weissenberger's position would reduce Rule 501 to a meaningless[88] nullity.[89] Rule 501 would be unnecessary if, as Professor Weissenberger asserts, the courts retain a general common law power to create[90] "evidentiary doctrines";[91] the provision purports to confer on them a power he asserts they already have.

The omission of any reference to "common law" in Rule 402 becomes even more significant in the context of 403. Like Rule 402, Rule 403 contains a list of probative dangers that can justify the exclusion of logically relevant evidence:

> Although [logically] relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[92]

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85. WRIGHT & GRAHAM, *supra* note 73, § 5199, at 222 n.16.

86. Amendola v. Secretary, Dept. of H.H.S., 989 F.2d 1180, 1182 (Fed. Cir. 1993) ("out of context"); DAE Corp. v. Engeleiter, 958 F.2d 436, 439 (D.C. Cir. 1992) ("the meaning of . . . language . . . depends on context"); Animal Legal Defense Fund v. Secretary of Agriculture, 813 F. Supp. 882, 887 n.7 (D.D.C. 1993) ("the language and design of the statute as a whole"); Lilienthal & Fowler v. Superior Court, 16 Cal. Rptr. 2d 458 (1993) (the whole act rather than isolated words); People v. Jiminez, 10 Cal. Rptr. 2d 281, 283 (1992) ("in context, with reference to the entire statutory scheme of which it is a part"); Squaw Valley Ski Corp. v. Superior Court, 3 Cal. Rtpr. 2d 897, 902 (1992) ("in context").

87. FED. R. EVID. 501.

88. Galli v. Metz, 973 F.2d 145 (2d Cir. 1992).

89. People v. Falconer, 11 Cal. Rptr. 2d 788 (1992).

90. Weissenberger, *supra* note 39, at 1311.

91. *Id.* at 1331.

92. FED. R. EVID. 403.

Before the adoption of the Federal Rules, the common law in some jurisdictions recognized another probative danger warranting the exclusion of relevant evidence: unfair surprise.[93] The text of Rule 403 fails to list surprise as an exclusionary ground. What is the effect of that failure? The third and fourth paragraphs of the accompanying Advisory Committee Note explain that since the text does not list surprise, the courts may no longer bar evidence on that basis.[94] In effect, the Note invokes the *expressio unius* maxim; in the Note, the drafters indicate that they carefully chose the words inserted in text and that the omission signals the demise of surprise as a recognized probative danger. By parity of reasoning, the omission of "common law" in Rule 402 signals the demise of the common-law power to enunciate evidentiary doctrine.

The Note accompanying Rule 402 buttresses the contextual argument and makes it untenable to argue that the omission in the text of 402 was an oversight. The second paragraph of the Note reiterates the permissible bases for an exclusionary rule of evidence, and like the text of Rule 402, the paragraph excludes the common law.[95] However, in virtually the next breath—the fifth paragraph discussing another issue—the same Note expressly refers to "common-law rules."[96] Rule 501 proves that the drafters knew how to refer to the common law when they wanted to, and the Note to Rule 402 compels the conclusion that the failure to mention common law in 402 was deliberate rather than inadvertent.

Finally, like the Advisory Committee Note, the extrinsic legislative history is also consistent with this conclusion. In general, the history documents a lengthy, careful consideration of the Rules. The process spanned years. The very length and care of the consideration strengthen the inference that the words ultimately approved were carefully chosen. The Federal Rules were not adopted hastily; quite to the contrary, as Professor Weissenberger notes, Congress' deliberation over the Rules was the tail end of an already prolonged process.[97] Congress had considered the proposed Rules for well over a year.[98] Even more to the point, the tenor of the testimony before the various Congressional committees "rather strongly suggests that Congress assumed that, except where [as in Rule 501] the Evidence Rules otherwise provide, there would be no decisional law of evidence."[99] One witness testified directly that

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93. CHARLES MCCORMICK, EVIDENCE § 185 (4th ed. 1992).
94. FED. R. EVID. 403, Adv. Comm. Note.
95. FED. R. EVID. 402, Adv. Comm. Note.
96. *Id.*
97. Weissenberger, *supra* note 39, at 1319.
98. *Id.* at 1319 n.63, 1320.
99. WRIGHT & GRAHAM, *supra* note 73, § 5199, at 222.

after Congress' enactment of the Rules, the judicial creation of evidentiary rules "will in all probability be prevented."[100] The broader "political context" lends further support:[101]

> In the aftermath of its Watergate battle with the Executive branch, Congress was jealous and assertive of its powers. Congress intervened to prevent the Supreme Court from promulgating the rules under the Court's own authority.[102]

Congress' battle with President Nixon in the courts also was fresh in its mind. As the culmination of that battle, in 1974, the Supreme Court handed down its decision in *United States v. Nixon*,[103] the same year Congress began its consideration of the Rules. The "political atmosphere in Washington" at the time of the Rules' passage makes it difficult to believe that Congress approved a statutory scheme "which would preserve the courts' common-law hegemony over evidence law."[104]

C. Subsequent Developments

Since the passage of the Federal Rules, there have been several developments which strengthen the case that the Rules impliedly abolish uncodified exclusionary rules of evidence. In 1978, the Reporter for the Federal Rules, the late Professor Edward Cleary, wrote a now-famous article about the proper interpretation of the Rules.[105] Professor Weissenberger cites the article,[106] quoting part of one sentence from the article: "[i]n reality . . . the body of common law knowledge [of evidence] continues to exist, though in the somewhat altered form of a source of guidance . . . ."[107] Unfortunately, he deletes critical language from both the beginning and the end of the passage. The full passage reads:

> In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided . . . ." [Fed.R.Evid. 402. See United States v. Grajeda, 570 F.2d 872 (9th Cir. 1978).] In reality, of course, the body of common law knowledge continues to exist, though in the

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100. *Id.* § 5199, at 222 n.17.
101. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 47.
102. *Id.*
103. 418 U.S. 683 (1974).
104. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 47.
105. Edward Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908 (1978).
106. Weissenberger, *supra* note 39, at 1331.
107. *Id.*

somewhat altered form of a source of guidance in the exercise of delegated powers.[108]

Several noteworthy aspects exist in the deleted language. The language deleted at the end of the passage indicates that the courts may look to case law precedents in deciding how to exercise powers "delegated" to them by the Rules but not to exercise an independent, common-law power to create evidentiary doctrine on their own motion. Furthermore, the first sentence deleted from the quotation flatly contradicts the assumption that the Rules leave intact the courts' earlier common-law power to develop evidentiary doctrine. The first sentence flatly declares that "no common law of evidence remains." Moreover, Professor Cleary's reference to Rule 402 makes it clear that, in his judgment, it is Rule 402 that abrogates that common-law power. Professor Cleary's citation to the *Grajeda* case further defines his interpretation. In that case the Court of Appeals for the Ninth Circuit declared, citing Rule 402, that the courts are no longer "free" to establish evidentiary rules independent of the Federal Rules.[109]

The relevant developments are not limited to federal practice. Later developments in the states reflect an even broader consensus that Rule 402 abolishes the courts' common-law powers to "create"[110] evidentiary rules and "superimpose" additional restrictions on the face of the statutory language.[111] The drafters of the Vermont Rules subscribed to the consensus view and explicitly stated in their Note to that state's Rule 402 that the rule eliminated prior common-law rules.[112] In other jurisdictions, when the drafters did not want to foreclose the courts' evolution of common-law evidentiary doctrines, they said so in no uncertain terms. In its order promulgating the Minnesota Rules, that state supreme court explicitly reserved the common-law power to revise evidentiary doctrine.[113] The drafters of an early version of the proposed New York code added language to their version of Rule 402 which would have partially preserved the courts' common-law authority.[114] The West Virginia drafters added a reference to decisional law in the text of their Rule 402.[115] Similarly, the Oregon drafting committee included the expression "decisional law" in their adaptation of Rule 402.[116]

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108. Cleary, *supra* note 105, at 915.

109. United States v. Grajeda, 570 F.2d 872, 874 (9th Cir. 1978), *withdrawn*, 587 F.2d 1017 (9th Cir. 1978).

110. Weissenberger, *supra* note 39, at 1311.

111. *Id.* at 1318.

112. VT. R. EVID. 402 Reporter's Note.

113. P. THOMSON, MINNESOTA PRACTICE: EVIDENCE 5 (1979).

114. WRIGHT & GRAHAM, *supra* note 73, § 5199, at 218 n.9.

115. W. VA. R. EVID. 402.

116. 1 JACK WEINSTEIN & MARGARET BERGER, WEINSTEIN'S EVIDENCE ¶ 402[06], at 402-26 (1992).

It would, of course, be a mistake to overstate the extent to which the Federal Rules operate as a self-contained evidence code. As Professor Cleary indicated, the courts may certainly turn to common-law precedents to help them resolve ambiguities in the text of the individual rules. In addition, the Rules contain some partial or complete windows to the common law. As previously stated, in the area of privileges, Rule 501 expressly tasks the courts to continue refining privilege doctrine by "common law" methodology.[117] In this doctrinal area, by the express terms of Rule 501, the courts may still exercise full common-law power. In addition, as we shall see at greater length in Part II, Rule 403 empowers the trial judge to exclude otherwise admissible evidence when, in the judge's mind, the attendant probative dangers substantially outweigh the probative value of the evidence.[118] However, power does not equate with the common-law power to create general exclusionary rules of evidence.[119] As Professor Weissenberger points out, Rule 403 is modeled after Model Rule 303.[120] He acknowledges that Model Rule 303 gave the trial bench limited "case specific" authority to exclude logically relevant evidence when the particular probative dangers incident to the admission of the evidence outstripped its probative worth.[121] Rule 403 does not confer true, common-law discretion to fashion evidentiary rules.[122] Instead, Rule 403 permits trial judges to exclude particular relevant testimony only on the basis of the factors specified in the text of the Rule.

II. The Role of Rule 402 in Rationalizing the Supreme Court's Decisions and in Protecting Trial Court Discretion

Part I explained the central flaw in Professor Weissenberger's general position: complete disregard of Rule 402, the most essential provision to understanding the design of the Federal Rules. This Part describes some of the more specific arguments which Professor Weissenberger advances to support his position. He not only critiques individual Supreme Court decisions construing the Federal Rules of Evidence; he also develops the policy argument that the Court's textualist approach to interpreting the Rules imperils the discretion which the trial bench needs to administer

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117. Fed. R. Evid. 501.

118. Fed. R. Evid. 403.

119. *See generally* Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 Vand. L. Rev. 879 (1988).

120. Weissenberger, *supra* note 39, at 1335.

121. *Id.*

122. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. Cal. L. Rev. 937, 980-82 (1990).

the Rules. As we shall see, though, these specific lines of argument are predictably flawed because they also overlook the role of Rule 402.

A. Rationalizing the Supreme Court Decisions Construing the Federal Rules of Evidence

To support his attack on the Supreme Court's approach to interpreting the Federal Rules, Professor Weissenberger faults several of the individual Supreme Court decisions construing the Rules. In some cases, the thrust of his critique is that the end result of the decision is overturning an uncodified exclusionary rule. He regards this as unsound.[123] In those cases, Rule 402 itself is the best answer to the critique. Properly construed, Rule 402 abolishes uncodified exclusionary rules of evidence. Thus, even if the exclusionary rule in question is a hoary, well-respected one, the decision overturning the rule is supportable under the Rules.

However, in the case of some other Supreme Court decisions construing the Rules, Professor Weissenberger launches slightly different attacks. The attacks on the decisions in *United States v. Abel*[124] and *Huddleston v. United States*[125] are particularly interesting.

The question presented in *Abel* in 1984 was whether proof of bias is a permissible method of impeachment under the Federal Rules. At trial, the prosecutor attempted to impeach a defense witness on the basis that both he and the accused were members of a gang sworn to commit perjury on each other's behalf. Proof of bias was[126] and is[127] a well-settled impeachment technique at common law. Article VI of the Federal Rules generally governs the impeachment and rehabilitation of witnesses. The problem is that there is no mention of "bias" or "partiality" in Article VI.[128] In *Abel*, the defense argued that since the Rules do not explicitly authorize bias impeachment, that impeachment technique is no longer permitted in federal practice. The *Abel* Court ultimately concluded that bias impeachment is still a viable technique.

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123. *E.g.*, Weissenberger, *supra* note 39, at 1318 (his criticism of the result in Bourjaily v. United States, 483 U.S. 171 (1987)).

124. 469 U.S. 45 (1984).

125. 485 U.S. 681 (1988).

126. CHARLES MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 40 (1954).

127. CHARLES MCCORMICK, EVIDENCE § 39 (4th ed. 1992).

128. In truth, the Federal Rules do mention bias impeachment. Rule 411 reads:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

FED. R. EVID. 411. Surprisingly, during the *Abel* litigation, this fact seems to have escaped both the litigants and the Court!

Professor Weissenberger treats the result in *Abel* as proof that, as a practical matter, the Court must resort to uncodified common-law doctrines to render the Federal Rules workable. He states that to justify its conclusion, the Court "relied on several pre-Rules [common-law] cases . . . ."[129] He adds that if "the Court [had] followed its usual [textualist] line of reasoning, it would have eliminated impeachment by bias . . . ."[130] After all, he writes, bias impeachment is "a pre-Rule doctrine which was not expressly preserved in the plain language of text of the Rules . . . ."[131] In Professor Weissenberger's mind, *Abel* is the case in point, showing in concrete terms that the Court's "customary statutory construction analysis"[132] is unworkable. Not once during this discussion does Professor Weissenberger allude to Rule 402.

In truth, Rule 402 explains the *Abel* decision. Chief Justice Rehnquist authored the Court's unanimous opinion. There are two key passages—both of which highlight Rule 402.

In the initial passage, the Chief Justice addresses the narrow question of the permissibility of bias impeachment under the Federal Rules:

> [Federal Evidence] Rule 401 defines as "relevant evidence" evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule. A successful showing of bias on the part of the witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.[133]

No one could deny that a witness' credibility is a fact in issue in a trial under the Federal Rules; if it were not, most of the provisions of Article VI would have to be deleted. The very existence of those provisions attests that a witness' credibility is "a fact . . . of consequence"[134] within the intent of that expression in Rule 401. Likewise, no one could dispute the proposition that a person's bias is a relevant factor in assessing his or her credibility.[135] The Chief Justice's reasoning was straightforward:

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129. Weissenberger, *supra* note 39, at 1311.
130. *Id.*
131. *Id.* at 1332.
132. *Id.*
133. United States v. Abel, 469 U.S. 45, 50-51 (1984).
134. *Id.*
135. *Id.* at 52.

Because proof of bias is relevant under 401 and no recognized basis for excluding the evidence existed under 402, the evidence was admissible.

It is true that the Chief Justice referred in passing to earlier common-law decisions permitting bias impeachment.[136] However, those references were makeweights; the premise of the decision is Rule 402. In *Abel*, there was no need to resort to any common-law precedent; even if there had not been a single prior common-law precedent permitting bias impeachment, the Chief Justice's Rule 402 analysis would still be valid. Once the logical relevance of a witness' impeachment is acknowledged, Rule 402 alone suffices to rationalize the outcome in *Abel*. By the terms of Rule 402, logically "relevant evidence is admissible, except"[137] in specified instances; the proffered bias evidence was indisputably relevant, and none of the specified exceptions came into play in *Abel*.

In the other key passage, the Chief Justice quotes Professor Cleary's article on the interpretation of the Rules.[138] However, he begins the quotation with the language deleted by Professor Weissenberger: "In principle, under the Federal Rules of Evidence no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided . . . .'"[139] The unanimous Court was not content to invoke 402 to resolve the technical question presented in *Abel*; the Court went out of its way to spotlight the central role Rule 402 has in the structure of the Federal Rules' scheme. The Supreme Court forcefully affirmed its position in June 1993 in *Daubert v. Merrell Dow Pharmaceuticals*.[140] There the Court unanimously held that the Rules overturn the common-law *Frye* rule, restricting expert testimony to generally accepted scientific theories. The Court cited *Abel* and again quoted the entire relevant passage from Professor Cleary's article. Indeed, the *Daubert* Court went further; the Court described Rule 402 as "the baseline"[141] of the Federal Rules and declared that "the Rules occupy the field."[142]

Just as he attacked the Court's reasoning in *Abel*, Professor Weissenberger targets the Supreme Court's 1988 decision in *Huddleston v. United States*.[143] Although the supposed point of the attack on *Abel* is to prove that the Federal Rules will not work without the benefit of judicially-created evidentiary doctrines, the gravamen of the complaint against *Huddleston* seems to be that the Court's reasoning proves too much.

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136. *Id.* at 51.
137. FED. R. EVID. 402.
138. *Abel*, 469 U.S. at 51-52.
139. *Id.* at 51.
140. 113 S. Ct. 2786 (1993).
141. *Id.* at 2793.
142. *Id.* at 2794.
143. 485 U.S. 681 (1988).

Both at common law[144] and under the Federal Rules,[145] a prosecutor may sometimes introduce evidence of an accused's uncharged crimes. Suppose, for example, that the accused is charged with an armed robbery committed on July 1, 1993. The robbery victim testifies that when the robber fled, he dropped his pistol at the crime scene. The investigating police officer testifies that he found a pistol with a certain serial number at the robbery scene. The prosecution has testimony that on June 1, 1993, the accused stole the pistol in question from a local gun store. The gun store clerk is prepared to identify the accused as the thief and to testify that the serial number of the stolen weapon matches that of the pistol found at the robbery scene. Although the prosecutor may not introduce the testimony about the June 1 theft to show the accused's general bad character,[146] she could offer the testimony to establish the accused's identity as the perpetrator of the charged crime.[147] The prosecutor is not relying on forbidden bad character reasoning prohibited by Federal Rules 404-05.[148] Rather, the evidence has legitimate, noncharacter relevance under Federal Rule of Evidence 404(b); her theory of logical relevance is that with its serial number, the pistol is a one-of-a-kind item and the testimony about the uncharged, June 1 theft places the accused in possession of the very weapon used to commit the charged July 1st robbery. Rule 404(b) countenances the admission of uncharged misconduct evidence on a noncharacter theory to prove "identity."[149]

Of course, a key part of the foundation for admitting testimony about the June 1 theft is the clerk's willingness to identify the accused as the thief. Whenever a prosecutor offers such uncharged misconduct evidence, proof of the accused's identity as the perpetrator of the uncharged act is an essential part of the foundation or predicate.[150] At common law, a split of authority existed as to the quantum of evidence needed to link the accused to the uncharged act.[151] Most courts assume that this type of testimony is highly prejudicial.[152] Consequently, prior to the adoption of the Federal Rules of Evidence, the prevailing view in the United States was that before admitting uncharged misconduct

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144. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18 (1984).
145. FED. R. EVID. 404(b).
146. IMWINKELRIED, *supra* note 144, § 2:18.
147. *Id.* § 3:28.
148. *Id.* § 2:18.
149. FED. R. EVID. 404(b).
150. IMWINKELRIED, *supra* note 144, § 2:05.
151. *Id.* § 2:08.
152. *Id.* §§ 1:02-:03.

evidence, the trial judge must find clear and convincing evidence that the accused committed the uncharged act.[153]

In *Huddleston*, the prosecution offered evidence of the accused's uncharged misconduct to establish the accused's mens rea. The accused was charged with possessing and selling stolen videocassette tapes. The charged offenses required proof of the mens rea element that the accused knew the tapes were stolen. At trial, the prosecution presented testimony about the accused's involvement in other similar transactions with stolen goods. The accused's uncharged transactions reduced the objective plausibility of his claim that he did not know the tapes were stolen.[154] Concededly, an innocent person can become enmeshed in suspicious circumstances; but the more frequently a person is involved in such incidents, the more improbable is his claim of an innocent state of mind.[155]

In *Huddleston*, all parties agreed that, as at common law, proof of the accused's identity as the perpetrator of the uncharged act is a requisite part of the foundation under the Federal Rules. However, the Rules did not expressly prescribe the measure of proof of the accused's identity. The defense urged the Court to hold that the majority, common-law rule of clear and convincing evidence is still in effect under the Federal Rules. Instead, the Court ruled that Federal Rule of Evidence 104(b) controlled. Rules 104(a)-(b) set out the procedures for determining the existence of foundational or predicate facts.[156] Rule 104(b) states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.[157]

Once again writing for a unanimous Court, Chief Justice Rehnquist declared that uncharged misconduct evidence is admissible under Rule 404(b) so long as the judge believes that a hypothetical rational juror "can reasonably conclude that the act occurred and the defendant was the actor."[158]

According to Professor Weissenberger, *Huddleston* is a dangerously broad decision requiring the "rejection of virtually any evidentiary doc-

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153. *Id.*

154. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 593-95 (1990).

155. *Id.*

156. FED. R. EVID. 104. *See generally* Edward J. Imwinkelried, *Determining Preliminary Facts Under Federal Rule 104*, in 45 AM. J. TRIALS 1 (1992).

157. FED. R. EVID. 104(b).

158. Huddleston v. United States, 485 U.S. 681, 689 (1988).

trine that is not found on the face of the literal text" of the Federal Rules.[159] He reads *Huddleston* as announcing that "[i]f the plain language of the Rules does not provide for a doctrine of [either] admissibility or inadmissibility, the doctrine" must be abandoned.[160] If *Huddleston* said that, Professor Weissenberger's criticism would be well-founded. If there must be an explicit statutory basis for recognizing even "a doctrine of admissibility,"[161] *Huddleston* would be at odds with *Abel*. As previously stated, Article VI of the Federal Rules does not explicitly authorize bias impeachment.

However, this criticism misses the mark because *Huddleston* does not say that. Again, Professor Weissenberger misreads the case because he fails to focus on the passages in the opinion devoted to Rule 402. The Court made it abundantly clear that it was holding only that there must be a statutory basis for an exclusionary rule which would have the effect of barring the admission of evidence that is logically relevant and satisfies all the explicit requirements of the Rules:

> Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence—evidence which makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The text contains no intimation . . . that any [other] showing is necessary before such evidence may be introduced for a proper [noncharacter] purpose [under Rule 404(b)]. If offered for a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.[162]

Interestingly enough, in the 1978 article by Professor Cleary which Professor Weissenberger cites,[163] Professor Cleary anticipated the result in *Huddleston*.[164] He noted an early post-Rules case applying the clear and convincing evidence standard under Rule 404(b). Professor Cleary condemned the case as unjustifiably "engrafting a further requirement"

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159. Weissenberger, *supra* note 39, at 1316.
160. *Id.*
161. *Id.*
162. *Huddleston*, 485 U.S. at 687-88.
163. Weissenberger, *supra* note 39, at 1331.
164. Cleary, *supra* note 105, at 917.

onto the text of the statute.[165] Professor Cleary singled out and repudiated the court's claim that "[a]s a codification founded on its historical antecedents, the Federal Rules of Evidence shall not be taken to repeal the products of our studied deliberation [such as the clear and convincing evidence standard] unless the intention is clearly manifest."[166] Professor Cleary obviously believed that no further manifestation of intention was necessary to overthrow an uncodified "doctrine of . . . inadmissibility"[167] such as the clear and convincing evidence standard. His belief is correct; as Part I demonstrated, Rule 402, standing alone, has ample force to abolish such exclusionary rules.

However, "doctrine[s] of . . . inadmissibility" are distinguishable from "doctrine[s] of admissibility" under Rule 402.[168] Contrary to Professor Weissenberg's suggestion, nothing in *Huddleston* states or implies that "a doctrine of admissibility"[169] in the sense of a theory of logical relevance must have an express statutory basis other than Rule 402 before the court may admit evidence on that theory. *Abel* is illustrative. Evidence of the witness' bias was logically relevant to a fact in dispute. Logically relevant evidence is presumed admissible under Rules 401-02. If there is no statutory exclusionary rule barring the evidence and the evidence successfully runs the gauntlet of Rule 403, the evidence is admissible. The Court described that sequence of analysis in *Abel*[170] and reiterated it near the end of the *Huddleston* opinion.[171] When an item of evidence passes the muster of that sequence of analysis, Rules 401-02 are ample statutory authorization for the admission of the evidence. A "doctrine of admissibility"[172] does not need any statutory sanction other than Rules 401 and 402.

B. Safeguarding the Discretion of the Trial Judiciary in Administering The Rules of Evidence

In addition to faulting individual Supreme Court decisions construing the Federal Rules, Professor Weissenberger argues that the cumulative effect of the decisions is to erode the necessary discretion of the trial judiciary in administering the Federal Rules.[173]

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165. *Id.*
166. *Id.*
167. Weissenberger, *supra* note 39, at 1316.
168. *Id.*
169. *Id.*
170. *Abel*, 469 U.S. at 51-54 (1984).
171. *Huddleston*, 485 U.S. at 691-92.
172. Weissenberger, *supra* note 39, at 1316.
173. *Id.* at 1325, 1329-30, 1332-39.

In one respect, Professor Weissenberger is eminently correct: It is imperative that any body of Evidence law accord the trial judge a significant measure of discretion in applying the Rules. No matter how hard they try, the drafters of any evidence code can never anticipate all the variations of the record that a trial judge will encounter. The presiding judge needs a modicum of discretionary authority to flexibly[174] adapt the evidentiary rules to the case as it unfolds in her courtroom. That discretion is widely viewed as "an indispensable tool of the law of evidence."[175] The drafters of the Federal Rules appreciated the desirability of granting such discretionary power to the trial judge. Rule 403 is the most obvious conferral of discretionary authority,[176] but it is by no means the only one:

> There are many other situations in which the language of the Federal Rules confers upon the trial judge the authority . . . to exercise judgment in the application of the rules to particular cases. . . . [A]lthough the words "discretion" and "discretionary" appear only six times, other terms such as "may," "in fairness," "would be unfair," "in the interests of justice," "helpful," and "assist" are also used to confer discretion on the trial court. . . . The term "may" is used thirty-seven times in the Federal Rules.[177]

Having conceded the trial bench's need for discretionary authority, however, it is quite another matter to leap to the conclusion that, in turn, that need requires the empowerment of appellate courts to continue to "create"[178] full-fledged "evidentiary doctrines"[179] in the nature of exclusionary rules. That argument is not only *non sequitur*; worse still, it flies in the face of the American historical experience that unfettered appellate power to fashion evidentiary rules is the worst enemy of trial court discretion. In some passages of his article, Professor Weissenberger makes it clear that he is discussing the discretion of the trial bench.[180] In other passages, though, he refers generically to the discretion of the judiciary[181] without distinguishing between the trial bench and the appellate courts. That distinction is vital.

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174. *Id.* at 1326.
175. People v. Castro, 696 P.2d 111, 115 (1985).
176. Leonard, *supra* note 122, at 964-66.
177. *Id.* at 966 n.134.
178. Weissenberger, *supra* note 39, at 1311.
179. *Id.* at 1331.
180. *Id.* at 1325, 1328-30, 1332-39.
181. *Id.* at 1307, 1310, 1311, 1326, 1334.

For the most part, legislative intervention to prescribe evidentiary rules has been far less frequent than the enunciation of exclusionary rules by appellate courts. More importantly, many of the proposed interventions have redounded to the benefit of the trial bench. One of the primary criticisms of the proposed Model Code was that it expanded trial court discretion at the expense of the appellate courts.[182] The Code's opponents charged that it conferred excessive discretion upon the trial judge.[183] Similarly, in drafting the California Evidence Code, the California Law Revision Commission intended to expand the trial judge's discretion, particularly over such matters as the form of the question.[184]

In adopting the Federal Rules of Evidence, Congress followed in the footsteps of the drafters of the Model Code and the California Evidence Code. In particular, the trial bench is the repository of the discretion granted by Federal Rule 403.[185] That discretion is not a discretion on the part of appellate courts to create general, categorical evidentiary doctrines. (To construe Rule 403 in that fashion would put it in direct conflict with Rule 402,[186] resurrecting the common-law power which Rule 402 abolishes.[187]) Rather, Rule 403 is designed to permit trial judges to balance the probative value of a particular item of evidence against the incidental probative dangers in an ad hoc, case-specific manner.[188] The intended impact of the adoption of Rule 403 was to shift power from the appellate courts to the trial bench.[189] The appellate court may review the trial judge's Rule 403 decision to determine whether the judge is guilty of an abuse of discretion,[190] but the court may not treat Rule 403 as an independent source of authority for evidentiary rule-making. In short, many of the statutory evidence codes have at-

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182. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 22; WRIGHT & GRAHAM, *supra* note 73, § 5005, at 88.

183. *Id.*

184. Kenneth W. Graham, Jr., *California's "Restatement" of Evidence: Some Reflections on Appellate Repair of the Codification Fiasco*, 4 LOY. L.A. L. REV. 279, 280-86 (1971).

185. Leonard, *supra* note 122, at 966-67.

186. Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 615 (1984).

187. Imwinkelried, *supra* note 119, at 879.

188. *Id. See also* Weissenberger, *supra* note 39, at 1335 (noting that Model Rule 303 is the forerunner of Federal Rule 403 and that "[t]he comment to Rule 303 stated that its application was case specific . . . .").

189. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 415, 457-58 (1989).

190. Leonard, *supra* note 122, at 977-84; Jon R. Waltz, *Judicial Discretion in the Admission of Evidence under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097, 1102 (1985).

tempted to protect trial court discretion from erosion by the appellate courts.

Although the rare legislative interventions in evidence law have been largely designed to ensure trial court discretion, interventions by the appellate courts are not only more frequent, but are primarily responsible for the proliferation of exclusionary rules in American evidence law. American appellate courts have had a "fascination with exclusionary rules."[191] Due largely to judicially-created exclusionary rules, the United States legal system has "the most complex, restrictive set of evidentiary rules in the world."[192]

Even when a legislature has acted to confer discretion on the trial bench, appellate courts have often misconstrued the legislation to retake *de facto* rule-making power. The California experience is instructive. The California Evidence Code contains an analogue to Federal Rule 403, namely, Evidence Code section 352.[193] The Advisory Committee Note to Rule 403 indicates that the drafters used section 352 as one of the models for Rule 403, and the language of the two statutes is strikingly similar.[194] Like Rule 403, section 352 is intended to guarantee the trial judge discretionary authority to balance the probative worth of an item of evidence against the attendant probative risks in a case-specific context. However, over the years, the California appellate courts began treating section 352 as a basis for formulating exclusionary rules of general applicability.[195] Under the aegis of section 352, the courts announced "rigid limitations on the discretion of the trial court"—hard-and-fast exclusionary rules requiring the trial court to exercise its discretion in certain, specified ways.[196] The appellate courts were especially inclined to do so in cases involving the use of convictions for impeachment purposes.[197] This line of appellate cases generated so much political opposition that, in 1982 the California electorate passed an initiative measure, Proposition 8, designed to repeal the line of authority.[198] In

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191. Graham, *supra* note 184, at 306.

192. CARLSON, IMWINKELRIED & KIONKA, *supra* note 3, at 1028.

193. CAL. EVID. CODE § 352.

194. CAL. EVID. CODE § 352 states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

195. Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1024-25 (1992).

196. People v. Castro, 696 P.2d 111, 115 (Cal. 1985).

197. *Id.* at 114-16.

198. *Id.* at 115-20.

a 1985 decision, the California Supreme Court itself was forced to acknowledge that "[t]he intention of the drafters of the initiative was to restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion which [the appellate courts] had grafted onto the code . . . ."[199]

In California, the appellate courts did not prove to be the guardians of trial court discretion. Quite to the contrary, in violation of the statutory mandate, they strove to circumscribe that discretion and arrogate some of the trial bench's authority to themselves. The exercise of ersatz "discretion" by the appellate courts proved to be the greatest threat to the preservation of the legitimate discretion of trial judges. The end of preserving trial court discretion is a laudable one, but empowering the appellate courts to formulate general exclusionary evidentiary rules is anything but a proven means to that end. The interpretation of Rule 402 adopted by the Supreme Court is far more likely to contribute to the realization of that end.

III. Conclusion

In closing, it is important to once again define the question presented. The issue is not whether the specific results reached in the individual Supreme Court decisions interpreting the Federal Rules are debatable as a matter of evidentiary policy. For example, without challenging the Supreme Court's general approach to interpreting the Rules, some commentators,[200] bar organizations,[201] and state courts[202] have questioned the result in *Huddleston*. For that matter, the issue is not even whether the Court has properly interpreted all the individual Federal Rules provisions involved in the cases. Again, without challenging the Supreme Court's general approach to construing the Rules, one might question the outcome in *Huddleston*.[203] The question presented here is the broader issue of

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199. *Id.* 117.

200. Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b), and 609(a)*, 38 Emory L.J. 135 (1989); Paul Rothstein, *Needed: A Rewrite—Where the Federal Rules of Evidence Should Be Clarified*, 4 Crim. Just. at 20 (1989).

201. The American Bar Association's Criminal Justice Section has urged the use of the clear and convincing proof standard. *Id.* The A.B.A. House of Delegates endorsed the Section's position. 57 L.W. (BNA) 2480, 44 Crim.L. (BNA) 2376.

202. State v. Garner, 806 P.2d 366 (Colo. 1991); Phillips v. State, 591 So.2d 987 (Fla. Dist. Ct. App. 1991); Minn. R. Evid. 404.

203. The textual approach adopted by the Supreme Court permits the judge construing a Rules provision to consider the accompanying Advisory Committee Note as a matter of course. *See* note 25, *supra*, and accompanying text. The Note to Rule 104 extensively cites writings by Professor Morgan. Fed. R. Evid. 104, Adv. Comm. Note.

the soundness of the Court's basic approach to interpreting the Rules.

Professor Weissenberger has made his view clear that the outcomes in several of the Supreme Court cases construing the Rules are "untoward."[204] Assuming *arguendo* that he is correct, the solution is not revising the Court's interpretive approach. Rather, given Rule 402, the solution must be to seek to amend the Federal Rules. The price of having a truly codified body of Evidence law is the necessity of resorting to the amendment process to overturn specific, untoward outcomes.[205]

That price is minimal. The amendment process is not unduly burdensome. In most instances, an amendment proposed by the Supreme Court does not even require the affirmative approval of Congress; the amendment takes effect so long as Congress does not act affirmatively to block the amendment.[206] Although the Rules are a relatively young statutory scheme, they have already been amended on several occasions. At this very moment, further amendments are pending.[207] In the future, the amendment process may be even easier to reconnoiter, since the Chief Justice recently reconstituted the Judicial Conference Advisory Committee on the Rules of Evidence.[208]

Professor Morgan was one of the architects of modern preliminary fact-finding procedures. Edward J. Imwinkelried, *supra* note 186, at 587-88. The late John Kaplan's article, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987 (1978), is one of the most lucid expositions of those procedures. In the article, Professor Kaplan argues that the dividing line between Rules 104(a)(competence) and 104(b)(conditional relevance) should be the test of whether we can trust the jury to administer the evidentiary rule in question. There is consensus that 104(b) applies to the issues of a lay witness' firsthand knowledge and a document's authenticity. According to Professor Kaplan, conditional relevance procedures apply to those issues because the jury can be trusted to administer those rules. Even if the jury decides that the witness lacked personal knowledge or that the document is inauthentic, there is little risk that the jury's exposure to the foundational testimony will distort the jury's deliberations; common sense should lead the jury to completely disregard the testimony if they conclude that the witness lacks knowledge or that the document is a forgery. However, using this test, it can be argued that the accused's identity as the perpetrator of an uncharged act should be classified as a competence issue under Rule 104(a). The old bromide teaches that "where there's smoke, there's fire." Suppose that at a conscious level a lay juror finds insufficient proof that the accused committed the uncharged act. Nevertheless, at a subconscious level the juror may suspect the accused's guilt. That danger is particularly acute when the judge permits the prosecution to introduce evidence of multiple uncharged acts. If one read the Advisory Committee Note as incorporating Morgan's procedure, as explained by Kaplan, one could reach a different outcome in *Huddleston*.

204. Weissenberger, *supra* note 39, at 1311-18.

205. Robert Aronson, *The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington*, 54 WASH. L. REV. 31, 37-42 (1978).

206. 28 U.S.C. § 2076.

207. For example, there is a pending amendment to FED. R. EVID. 705.

208. *Judicial Conference Advisory Committee on the Rules of Evidence Starts Work*, AMERICAN ASSOCIATION OF LAW SCHOOLS SECTION ON EVIDENCE NEWSLETTER at 1 (May 1993).

The price is certainly modest when one considers the benefits flowing from the Supreme Court's approach to interpreting the Federal Rules. In the short term, the benefits are protecting trial court discretion from appellate erosion and effectuating the liberal structural design of the Rules.

The potential long-term benefit is even more important. Although the Model Code and the Uniform Rules were well-intentioned in their efforts to liberalize and simplify American evidence law, those statutory schemes enjoyed little success. No jurisdiction adopted the Model Code,[209] and the Uniform Rules won acceptance in only three states.[210] The Federal Rules are the first reformist evidence code to gain widespread acceptance in the United States.[211] The United States still has the most complicated, restrictive set of evidentiary exclusionary rules in the world.[212] However, the Federal Rules, especially Rule 402, represent a critical, initial step toward the rational simplification of American evidentiary doctrine. Better still, contemporary empirical research may be taking us to the brink of another major step in the same direction; some of the most recent research calls into question the behavioral assumptions underlying many of the exclusionary rules developed by the common law courts.[213] At this promising juncture, it would be tragic to take a step backward; that is precisely what we would be doing by giving the appellate courts carte blanche to enforce exclusionary rules which neither the Advisory Committee, nor the Supreme Court, nor Congress saw fit to codify.

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209. CARLSON, IMWINKELRIED & KIONKA, *supra* note 73, at 22.

210. *Id.* at 23 (Kansas, New Jersey, and Utah).

211. *Id.* at 26-27; GREGORY P. JOSEPH & STEPHEN A. SALTZBURG, EVIDENCE IN AMERICA: THE FEDERAL RULES IN THE STATES (1987) (4 vols.).

212. CARLSON, IMWINKELRIED & KIONKA, *supra* note 73, at 22.

213. *E.g.*, Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992); Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCH. REV. 65 (1991); Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992); Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 892 (1982); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Note, *Are Children Competent Witnesses? A Psychological Perspective*, 63 WASH. U. L.Q. 815 (1985).

Panhandlers at Yale: A Case Study in the Limits of Law

Brandt J. Goldstein*

Thursday night is good for the regular panhandlers who work York Street and Broadway, a small business district in the shadow of Yale University in New Haven, Connecticut. John repeats his sing-song chant, "Howyadoin! Howyadoin! Howyadoin!" and keeps time with his jangling cup of change. Down the street, Ricky sits on a short wall leading to Yale's Hall of Graduate Studies, asking passersby how their evening is going. Some pedestrians steer carefully around him, looking away. Others lean over, handing him a quarter. Now and then someone greets Ricky by name, talks to him for several minutes, and gives him a dollar or two, maybe more. A New Haven police officer on the beat walks up to Ricky and nods. Ricky nods back to the officer, smiles, and says hello. The officer asks if anyone has threatened Ricky that evening. Ricky says no, and adds that the new panhandler who had recently turned up seems to have left town. "Good thing, too," Ricky continues. "Didn't need him making all that noise, looking like a fool, chasing people off."

One can find panhandlers like Ricky in most every American city. Panhandling, it seems, is everywhere. But although the problems of homelessness and abject poverty have stood near the top of the national agenda for the last decade, little attention has been given to panhandling's role in the lives of the extremely poor. In recent years, a debate has raged among policy makers, academics, and the public over the number of the nation's homeless,[1] the causes of homelessness,[2] the possible

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1. *See* Thomas J. Main, *What We Know About the Homeless*, Commentary, May 1988, at 26, 27. The Department of Housing and Urban Development ("HUD") released its own survey in 1984, which determined that the homeless numbered between 250,000 and 350,000 in that year. *See id.* The HUD figure, although widely attacked, was deemed roughly correct in a 1986 National Bureau of Economics Research Study. *See* Richard B. Freeman and Brian Hall, Permanent Homeless in America? (1986) (un-

responses to the myriad problems faced by the homeless and the extremely poor,[3] and even the definition of "homeless."[4] Despite this intense focus

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published manuscript, National Bureau of Economic Research). Finally, the Bureau of the Census in April 1991, released its 1990 Shelter and Street Night ("S-Night") count that found roughly 230,000 people either in emergency homeless shelters or visible at pre-identified street locations. *Census Bureau Releases 1990 Decennial Counts for Persons Enumerated in Emergency Shelters and Observed on Streets*, U.S. Dep't of Commerce News Release, Apr. 12, 1991. The results of S-Night, census officials assert, will not be considered as a count of the homeless living in the United States, but are meant to "ensure the fullest possible count of America's population." *Id.* at 1.

Sociologist Peter Rossi has argued that homelessness should not be considered as a separate phenomenon; homelessness, he argues, "is more properly viewed as the most aggravated state of a more prevalent problem, *extreme poverty*." PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS 8 (1989) [hereinafter ROSSI]. Rossi estimated in 1989 that there were between four and seven million people in the United States who were extremely poor, *id.* at 81,—"people with a precarious hold on the basic amenities of life that most of us take for granted." *Id.* at 8. He defines the extremely poor as consisting of households (including single people) "whose annual incomes are three-quarters or less of the current official poverty line, or below $4,000" in 1988. *Id.* at 13.

2. Among the causes of homelessness that commentators have pointed to are the lack of inexpensive housing for poor families and poor unattached persons, ROSSI, *supra* note 1, at 181-82; the lack of demand for unskilled labor, which contributes to low employment and earnings among the extremely poor, *id.* at 186; the large-scale release of the mentally ill from institutions in the 1960s and early 1970s, Ellen L. Bassuk et al., *Is Homelessness a Mental Health Problem?*, 141 AM. J. PSYCHIATRY 1546, 1549 (Dec. 1984); the decrease in the real value of public welfare benefits, ROSSI *supra* note 1, at 190-94; and substance abuse and the lack of services for substance abusers. UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 42 (1989).

3. Rossi has advanced a battery of suggestions, distinguishing between "short-term remedies" and "long-term policy recommendations." ROSSI, *supra* note 1, at 195. Short-term remedies he suggests include creating "[a]n aggressive outreach program" to enroll eligible individuals in existing welfare programs, moving the severely mentally ill into "total-care institutions," and increasing financial support for existing homeless shelters. *Id.* at 196-200. Among the long-term policy recommendations he advances: improving the labor market for younger workers, subsidizing housing for "younger unattached persons," particularly through increasing the number of single-room occupancy units, increasing welfare support for the chronically mental ill, and establishing a federal "Aid for Families with Dependent Adults" program that enables poor families to supply housing, food, and other necessities to adult family members unable to support themselves. *Id.* at 200-09.

Others have forwarded simpler—and probably simplistic—solutions. Robert Hayes, a longtime advocate of the homeless, made famous a "three-part" policy solution for homelessness: "housing, housing, housing." Robert C. Ellickson, *The Homelessness Muddle*, 99 PUB. INTEREST 45, 59 (Spring 1990). Ellickson maintains that Hayes's view is flawed because "homelessness is not mainly attributable to breakdowns on the supply side of the housing market . . . . Instead, homelessness [generally results] from the demand side of the market—that is, from the condition of homeless people themselves." *Id.* Ellickson suggests specialized housing vouchers for those suffering from serious mental problems (designed to get the mentally ill into small-scale "board-and-care facilities"),

on homelessness,[5] however, the activity of panhandling, generally associated with homelessness and extreme poverty, remains relatively unexplored. For instance, Peter Rossi's recent study, *Down and Out in America: The Origins of Homelessness*, an empirically authoritative work on the conditions of homelessness and extreme poverty, devotes a mere six lines to panhandling.[6] Similarly, the *1990 Annual Report of the Interagency Council on the Homeless* discusses panhandling in one sentence.[7]

Law reviews have not completely ignored the issue of panhandling, but their treatment of that issue reflects legal myopia. The legal scholarship on panhandling rests comfortably on the rarified plane of constitutional law, arguing that the First Amendment protects panhandling as a matter of free speech.[8] The authors advancing these First Amendment arguments generally assume that courts and legislatures must be persuaded that panhandling is constitutional. The authors apparently believe that without constitutional protection, panhandlers will be silenced under a

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programs that encourage homeless singles capable of working to gain employment, and (for the sake of affected children) direct rent payments from the government to the landlords of those heads of homeless families who have proven themselves unable to "manage an independent household." *Id.* at 56-57.

4. Rossi defines homelessness as "not having customary and regular access to a conventional dwelling." Rossi, *supra* note 1, at 10. Ellickson has pointed out that this "bundled" definition, which includes both those who sleep in places "not designated as residences" (for example, shelters) and those who "obtain temporary housing," "leads to the paradoxical result that greater governmental spending on shelter programs increases the reported number of homeless people." Ellickson, *supra* note 3, at 45.

5. There is some evidence that national concern for the issue of homelessness is decreasing. *See, e.g.*, Jason DeParle, *Homeless Advocates Debate How to Advance the Battle*, N.Y. Times, July 8, 1990, at A14 ("Recent months have brought signs of what advocacy groups have begun to call a backlash against the homeless, including cuts in municipal aid to them around the country, evictions from public places and increasing public anger at begging and street encampments."). Mitch Snyder, perhaps the nation's best-known advocate for the homeless before he committed suicide in July, 1990, said weeks before his death, in reference to homelessness, "we're stagnating. The issue is in recession." *Id.* Further, a well-known *liberal* syndicated columnist wrote not long ago of her own "compassion fatigue." Ellen Goodman, *Swarms of Beggars Cause 'Compassion Fatigue,'* New Haven Reg., Aug. 4, 1989, at 9.

6. *See* Rossi, *supra* note 1, at 108, 110.

7. Interagency Council on the Homeless, 1990 Annual Report 31 (1991).

8. *See, e.g.*, Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 Harv. L. Rev. 896 (1991) (panhandling is fully protected speech that fits within Supreme Court precedent upholding right to solicit charitable contributions); Charles F. Knapp, Note, *Statutory Restriction of Panhandling in Light of* Young v. New York City Transit: *Are States Begging Out of First Amendment Proscriptions?*, 76 Iowa L. Rev. 405 (1991) (panhandling constitutes expressive conduct protected by the First Amendment); Anthony J. Rose, Note, *The Beggar's Free Speech Claim*, 65 Ind. L.J. 191 (1989) (similar); Stephanie M. Kaufman, Note, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 Geo. L.J. 1803 (1991) (similar).

crush of anti-begging legislation. Consider, for example, this reaction to the Second Circuit's recent decision in *Young v. New York City Transit Authority*,[9] upholding the constitutionality of a panhandling prohibition in the New York City subway:

> The *Young* decision dealt a crippling blow to panhandlers everywhere. Because *Young* asserted that the first amendment does not protect begging, states are free to regulate or prohibit begging as they see fit. The only recourse left to beggars, at least in the Second Circuit, is to appeal to elected representatives.[10]

Advocates such as the writer just quoted also appear to believe that if panhandling is constitutionally protected, then panhandlers shall remain undisturbed in their day-to-day requests for handouts: as the Constitution goes, so goes panhandling. But is the constitutional status of panhandling really that important as a practical matter?

Perhaps not. In fact, the reality of panhandling often has little to do with the narrow issue of free speech. A thorough understanding of the control of this complex social and economic phenomenon is not to be had from the law reporters. By focusing on the rare legal challenges to anti-panhandling legislation, we in the legal community ignore the vast majority of panhandling activity that does *not* become the object of litigation, and thus we fail to see the limited influence of the formal legal structure on this pervasive phenomenon. On the streets of New Haven, Ricky and his peers find that the law books control their panhandling far less than do the relationships and informal norms that exist among panhandlers, police officers, pedestrians, and area businesses. In turn, the contours of those relationships and norms are closely linked to the dynamics of panhandling itself: how the panhandlers solicit donations. The control and dynamics of panhandling, moreover, cannot be fully grasped without knowing who the panhandlers are and why they panhandle. In short, even to understand the regulation of panhandling (let alone recommend how to modify regulation) requires less research in a law library, and far more time on the street.

To reach beyond the narrow question of panhandling's constitutionality and identify a broader set of legal and policy concerns relating to panhandling, this Article investigates in detail the panhandling in New

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9. 903 F.2d 146, 153-54 (2d Cir.) (holding that panhandling is not protected speech but rather "expressive conduct" that does not "convey a 'particularized message'" and is thus undeserving of constitutional protection), *cert. denied*, 111 S. Ct. 516 (1990).

10. Aaron Johnson, Comment, *The Second Circuit Refuses to Extend Beggars a Helping Hand:* Young v. New York City Transit Authority, 69 WASH. U. L.Q. 969, 979 (1991).

Haven's York Street/Broadway business district ("the York district"). The Article seeks to answer four empirical questions about panhandling in the York district: (1) Who panhandles in this area? (2) Why do they panhandle? (3) What are the strategic components of panhandling? and, most important, (4) How is panhandling regulated, and by whom? To answer these questions, the Article draws on extensive interviews the author conducted in 1991 and 1992 with panhandlers, police officers, business owners and employees, staff from various state agencies, prosecutors and, more informally, charity workers and pedestrians. The Article thus offers less of a traditional legal analysis than an extended "reality check": an empirical polemic, confronting the legal and policy communities with a detailed picture of previously unidentified and unexamined problems associated with panhandling and its regulation.

The Article proceeds in four parts. Part I examines demographic and other background characteristics of the panhandlers in the York district. Part II discusses how the panhandlers obtain basic necessities and attempts to determine why they panhandle. Part III explores the strategic elements of panhandling—those factors that determine a panhandler's success in receiving donations. Part IV discusses the regulation of panhandling, focusing not on formal legal rules, but on the informal norms and relationships among panhandlers, York district businesses, and the New Haven and Yale University police. The conclusion discusses, in broader terms, the relationship between law and other forms of social control, and focuses on the research and practical implications of the fact that—as is the case with panhandling in certain environments—law may often have little influence in controlling human behavior.

I. Who Panhandles in the York District?

Part I describes basic characteristics of the panhandlers in the York district: age, sex, race, education, family relationships, employment and criminal records, and chemical dependencies. This Part intends to provide both a detailed account of the panhandlers' backgrounds and, in combination with Part II, to provide information that will help elucidate the dynamics of panhandling, examined in Part III.

The York district included a group of twelve regular panhandlers, or "regulars," and, on average, two to four "transients."[11] The infor-

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11. The term "regular" here means those panhandlers who, according to their own accounts, and to those of area businesses and police, panhandled "regularly" in the York district, meaning at least three times a week, but usually much more. In less precise but perhaps more significant terms, "regulars" were those panhandlers who maintained continuing relationships, or at least contact, with the police, businesses, and pedestrians in the York district. *See infra* Part IV. Based both on the author's observations and on

mation in Parts I and II largely relates to the regular panhandlers,[12] many of whom were interviewed repeatedly, with much of the information on each panhandler corroborated by other panhandlers and many other individuals interviewed for the study. Transients are discussed more fully in Parts III and IV.

Generalizing, the regular panhandlers in the York district shared a number of characteristics, many of which reflect broader data on the extremely poor. The panhandlers were almost uniformly young to middle-aged African-American male adults. They were unmarried, but most maintained at least one close family relationship. The panhandlers were not well educated, and, excluding panhandling and workfare, they did not work. Many suffered from some degree of alcohol or drug abuse; two had significant psychological difficulties. Finally, although a number of panhandlers had a criminal record, at the time of the study they were more likely to be victims of crime than lawbreakers themselves.

A. Demographic Characteristics

Perhaps the most salient feature of the district's panhandlers was the uniformity of the race, sex, and age of its members. Eleven of the twelve interviewees were African-American men between the ages of twenty-five and forty-five; one was a white woman of about forty. Many of the panhandlers also had similar education levels and family backgrounds. Of the nine lucid panhandlers (all African-American men), at least seven had no father living with them during their childhood (two panhandlers would not discuss their families). Further, only two of the

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the knowledge of the New Haven and Yale police and the panhandlers themselves, every "regular" panhandler in the York district during the spring of 1991 was interviewed.

The names (all pseudonyms) of the twelve regulars were: Chip, Ricky, John, Barry, Lou, James, Terry, Keith, Fred, Linda, Sandy, and Dave.

The term "transient" encompasses all those panhandlers other than regulars. "Transients" can be divided into at least two rough groups: (1) those panhandlers who were not "associated" with New Haven (neither domiciled nor homeless within the city of New Haven) and (2) those panhandlers who *were* "associated" with New Haven, and circulated within the system of shelters, halfway houses, drug and alcohol treatment centers, jails, and other institutions in and around the city, never panhandling within the York district more than a few times each month, and often much less. The study focuses less on transients than on regulars, although the study considers the relationship among the two groups in Parts III and IV.

For the methodology and structure of the study, see *infra* Appendix on Methodology.

12. The regular panhandlers will also be referred to as "regulars" or "interviewees." A further term, "lucid regular," refers to those nine regulars (of the twelve in all) who were generally intelligible and appeared mentally sound. Three regulars were not lucid: two suffered from significant mental illness, one was routinely severely drunk.

nine had graduated from high school, while a third had obtained his graduate equivalency diploma in his early twenties.

A majority of the interviewees had lived in New Haven all or nearly all of their lives. Of the nine lucid panhandlers, four were born and raised entirely in New Haven, while two more had moved to New Haven as young children. Three came to the city as adults. Two of these three had followed siblings who had chosen to live in New Haven because they believed the city offered generous welfare benefits; the third panhandler cited "employment and welfare possibilities." Further, one panhandler who had come to New Haven as a child said his mother had moved there because she thought government benefits were easily obtained in New Haven.[13]

Ten of the twelve panhandlers maintained close relationships with at least one person, often a family member. Eight remained in close contact with one or more members of their family, and five had a sibling or parent in New Haven or nearby Hamden. None of the twelve interviewees was married at the time of the study, although three of the men had a female companion. Four of the panhandlers had children. Two panhandlers, Dave and Linda, each had children in New Haven, and maintained some contact with them.[14] Two others had children out of town. Ricky had children in South Carolina, and he spoke to them

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13. The panhandlers provided this information in response to the general question, "Why did you come here?" rather than to a question specifically mentioning government benefits. This finding indicates, on a small scale, some consistency with recent empirical research that people take into account the relative availability of welfare benefits when deciding whether and where to move. *See* Paul E. Peterson & Mark Rom, *American Federalism, Welfare Policy, and Residential Choices*, 83 AM. POL. SCI. REV. 711, 725 (Sept. 1989) ("[L]ow income people are sensitive to interstate differences in welfare policy. This does not mean that large numbers of poor people rush from one state to another with every modest adjustment in state benefit levels. But the data do suggest that over time, as people make major decisions [about moving], they take into account the amount of welfare provision a state provides and the extent to which it is increasing."). *See also New Haven Ranks High in Poverty Because It Does So Much for Poor*, NEW HAVEN REG., Nov. 20, 1988, at B3 ("New Haven has such a high proportion of low-income families because we have been trying hard for more than 40 years to provide publicly constructed and subsidized housing, to make health services accessible to the poor . . . to build community support services for single mothers and their children, to create soup kitchens and shelters for the homeless.").

Although such services may attract those who seek them, the idea of a "welfare magnet" should not be overemphasized. As Amitai Etzioni and countless other critics have insisted, much social science, particularly economics, overestimates the prevalence of "rational" behavior among human beings. *See generally* AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS (1988).

14. Linda's son was a homeless adult in New Haven with whom she ate occasionally; Dave did not elaborate on his relationship with his children.

by phone occasionally. Lou had lost track of his wife and kids. Two panhandlers, Lou and Barry, told me they had no one they could "count on."[15]

The panhandlers also were friends with one another, and with various police officers, pedestrians, and, less often, employees of York district businesses.[16] James and Terry, who panhandled near one another, were best friends; Ricky and John also had a warm relationship. Keith and Linda spent up to several days each week drinking together, while Sandy and Dave would chat briefly when they met on the street.

B. Employment

The panhandlers were almost uniformly unemployed during the year prior to being interviewed. Six of the panhandlers participated in a New Haven "workfare" program to "pay" their rent as tenants in city-subsidized apartments,[17] although one, Sandy, said that he bribed a bookkeeper to record work hours that he never completed. Those on workfare spent up to thirteen and one-half hours per week performing a job in the program, such as sorting clothes at a Salvation Army store or serving food at a soup kitchen.[18] One of those on workfare referred to it as "a complete joke"; another called workfare "ridiculous." Yet another panhandler observed that most individuals with workfare responsibility "do almost nothing—everyone's trying to see who can do the least." The Office Manager of the New Haven City Welfare Department described workfare jobs as "not meaningful" because they required no skill and offered "no training."[19]

Only one of the twelve panhandlers, Terry, had been formally employed in the past twelve months. Terry held a part-time job at a local fast-food restaurant for six weeks in the spring of 1991, after which he either quit or was fired. Terry would not elaborate, saying only that he did not agree with his supervisor's "specific way of getting things

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15. This question, used in the Chicago Homeless Study, was borrowed from Rossi, *supra* note 1, at 173, 173 n.17. The question, "Do you have anyone you can count on?" seemed a reasonably effective way to identify "relationships that involve[] more than superficial acquaintance." *Id.* 173 n.17.

16. *See infra* Parts III.C., IV.B, IV.C.

17. For discussion of shelter, see *infra* notes 37-43 and accompanying text.

18. The number of hours worked depended on the rent that the city paid for an individual panhandler's apartment. The maximum amount of rent the city would pay each month through Connecticut's General Assistance program was $325. The New Haven City Welfare Department valued one hour of workfare at six dollars. Thus, workfare hours were determined by dividing the rent amount by six to reach a monthly requirement; the monthly figure was then divided by four to determine the weekly requirement. Interview with Michael Randi, Office Manager, New Haven City Welfare Department, in New Haven (Mar. 19, 1992).

19. *Id.*

done." Rounding out the picture, five of the twelve panhandlers had not worked at all—through workfare or otherwise—in the year prior to the study.[20]

Matters had not always been so bleak for the interviewees. Indeed, eight of the nine lucid panhandlers had held steady jobs five years prior to the study. Three panhandlers once had work that required significant training—stonecutter, substitute schoolteacher, foundry worker—while five others had more menial positions.[21] Although it is difficult to be certain why each panhandler lost his job, five panhandlers stated that they had been laid off for economic reasons. Two said they had lost their positions because of chemical dependencies, and one claimed to have become disabled and incapable of working.

At the time of their interviews, all nine lucid panhandlers said they were seeking work. Few attractive jobs seemed available to them, however, and the panhandlers generally indicated that they were uninterested in working at the minimum wage.[22] Most claimed to check newspapers, as often as daily, for employment, and three of the panhandlers were apparently pursuing specific opportunities.[23] But the only jobs that the panhandlers knew were routinely available in the New Haven area were part-time positions at fast-food restaurants.[24] Entry-level work at the

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20. Two of those five panhandlers said directly that they had not worked; the other interviewees were able to provide information on the three panhandlers who did not provide much useful information themselves. Ricky and John (two of the more senior regulars) observed that the perpetually drunk panhandler, Linda, and one of the two mentally disturbed individuals, Barry, had both wandered York and Broadway for over a year, and had not worked during that time. The other mentally disturbed panhandler, Chip, had panhandled in the York district since January 1991, when he was released from the Connecticut state penitentiary at Cheshire. Since his release, he, too, apparently had not worked.

21. In addition, three panhandlers were veterans, although none had served in the military in the previous ten years.

22. Eight stated that they would be willing to work for at least seven dollars per hour.

23. Terry, for example, mentioned an advertisement seeking a van driver for seven dollars per hour, if the applicant had a valid Connecticut driver's license. He did not, however, have a license.

24. Only two panhandlers mentioned the possibility of working at Yale University, New Haven's largest employer, as a custodian or maintenance worker, or in a similar capacity. James claimed that several months prior to being interviewed, he had applied for work at Yale, but that despite "things looking encouraging," the personnel office never contacted him. He did not return to the office to learn if any job had become available.

Custodial and maintenance work at Yale, was, in fact, relatively difficult to obtain. No full-time jobs (which included union membership) had been immediately available for several years. An applicant was required to apply first for "casual work," which meant spot jobs for a thirty-day trial period. The waiting list for "casual work" sometimes had

Burger King restaurant on Whalley Avenue, for example, began at $4.25 per hour with no benefits. The number of hours a new employee could work were partly determined by the manager's appraisal of the employee, but a full work week was generally unavailable.[25] The regulars shunned this employment option, stating that the skimpy pay and short hours were not worth their time. Several panhandlers either said explicitly or implied that they were better off relying on panhandling and the welfare benefits they received[26] than they would be were they to take the low-paying jobs potentially available to them.[27]

In addition to the economic issue of low earnings, five of the nine lucid panhandlers mentioned that they would only take a job that allowed them to keep their "dignity" or "self-respect," something they felt was impossible as a fast-food restaurant cashier, a leaflet distributor, and so forth. For example, although other factors may have affected Terry's departure after six weeks at a Wendy's restaurant, it appeared that he was deeply troubled about being thirty-five years old and working on the bottom rung of a hamburger restaurant staff. Dignity was also tied to the wage itself. Ricky explained: "I don't work for no petty change."

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as many as seventy individuals on it, with a waiting period of three or four months for the *first* person on that list. Obtaining a "casual work" position was made still harder by an office policy requiring that spot jobs first be made available to union members seeking overtime. If a "casual work" position did open up, the new employee often found herself working for months, even a year, with no union membership, job security, and so on. The starting wage for "casual work" was approximately seven dollars per hour, about two dollars per hour below the lowest union wage. Telephone interview with Sara Williams (pseudonym), Administrative Assistant to the Placement Representative, Placement Office of Human Resources, Yale University (Mar. 30, 1992).

25. Moreover, full benefits were not available until an employee became a manager, which often took several years. Telephone interview with Ivan Osorio, Manager, Burger King restaurant, 169 Whalley Avenue, New Haven (Mar. 30, 1992). Osorio stated that he had worked at the Whalley Burger King for "about a number of years" and had "never" encountered a "homeless person" or a "beggar" who applied for a job there, although he was accustomed to "street-people types" coming into the restaurant to ask for food or money from the employees. *Id.* Similar job opportunities were available (although the number of openings varied significantly from month to month) at the McDonald's restaurant down the street. Telephone interview with Charles Ellison, Manager, McDonald's restaurant, 250 Whalley Avenue, New Haven (Mar. 30, 1992). Both Osorio and Ellison indicated that the job opportunities at their respective restaurants had remained about the same for the last two years.

26. *See infra* notes 46-49 and accompanying text.

27. Lou, an amiable, bright man who was once a chef and had been on the street several years, explained the economic calculations more rigorously than his peers. He said that in his last job, as a dishwasher, he was earning $200 per week, before taxes. After taxes, $85 per week rent at a local YMCA, $30 per week in food, $10 per week in transportation, and the child support payments he owed his former wife, he was often unable to break even. He was in "better shape now," he said, receiving $58.90 in General Assistance benefits every two weeks and panhandling, than he would be if he were to hold two fast-food service jobs.

Ricky and his peers expressed particular interest in factory or construction work, although none knew of such opportunities. In short, given the perceived lack of attractive employment in New Haven, it appeared unlikely that any of the regular panhandlers would find steady work in the near future.[28]

An apparent paradox in the panhandlers' approach to employment bears mention here. At first glance, it may seem contradictory for the panhandlers to emphasize the dignity of certain kinds of work at relatively high levels of pay. After all, panhandling is among the least dignified ways to make money. In a recent university survey in which 1,500 adults ranked the prestige of over 700 occupations, panhandling ranked dead last, below even prostitution and street-corner drug dealing.[29] Despite panhandling's stigma, however, those who panhandle do not answer to an employer, a point emphasized by three of the panhandlers. Moreover, it may be that by setting such ambitious objectives for their next jobs, some panhandlers avoided facing the challenges and anxieties of entering the workplace again—of maintaining a disciplined schedule, meeting others' expectations, and so forth. Extended conversations with certain of the panhandlers suggested that such factors might be at work.

C. Chemical Dependencies

Contributing to and compounding their other difficulties, most of the panhandlers had significant, longstanding problems with alcohol or drugs. Of the twelve interviewed, at least seven were dependent on one or the other. It remained uncertain whether any of the panhandlers were *not* chemically dependent. Four (Chip, Linda, Keith, and Terry) were alcoholics, and drank excessively. Chip and Linda appeared drunk whenever the author spoke with them, and both were routinely incoherent. Keith once unzipped an athletic bag he had with him, revealing three large bottles of cheap whiskey, all of which he planned to drink "as I get around to it." Three more of the panhandlers appeared to drink often, but were evasive about their consumption. A lieutenant from the Yale University Police Department, summing up the situation in the York district, stated: "Alcohol is the drug of choice. Most of [the regulars] drink a lot, some look like they're drinking nonstop."[30] Two

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28. In fact, in March 1992, nearly one year after the initial set of interviews, ten of the twelve regulars were still panhandling in the York district.

29. *See* Pamela Mendels, *Workbook*, NEWSDAY, Feb. 9, 1992, at 87 (summarizing study of occupational prestige conducted by researchers at University of Southern California and University of California at Irvine).

30. Interview with Nancy Warren (pseudonym), Lieutenant, Yale University Police, in New Haven (Mar. 28, 1992). While three New Haven police officers agreed with Warren's assessment, one New Haven officer believed that on the whole, the regulars consumed very little alcohol. Interview with Ron Oates (pseudonym), Sergeant, New Haven Police Department, in New Haven (Mar. 19, 1992).

interviewees (Sandy and Lou) who did not drink apparently were addicted to crack, and both stated that a third (Dave) was addicted, although the author could not confirm this assertion.[31] According to several panhandlers, crack was readily accessible in New Haven. A "crack house" was as nearby as Lake Place, two blocks down Broadway, and others could be found throughout the poorer neighborhoods surrounding Yale.[32] As one panhandler said, "It's all around you, all around you, everywhere."

D. Criminal Records

Completing the discouraging picture of the panhandlers' backgrounds, at least six of the twelve interviewees had a significant criminal record. Four of those six had served time in Connecticut state prisons for theft and similar crimes, while two had been imprisoned for violent crimes (Lou had assaulted his former wife, Ricky had "accidentally" stabbed a man). None, however, admitted to current involvement in criminal activity, other than possessing drugs. In fact, the interviewees were more often *victims* than perpetrators of crime. At least six of the twelve regulars said they had been mugged in the previous year, and three had been assaulted repeatedly.[33]

E. Conclusion

The York district panhandlers were, in sum, a relatively uniform group of people. Single, unemployed, adult African-American males with little education and, often, significant alcohol or drug problems, or a criminal record, or both. Although the sample size of this study is small, many of these characteristics nevertheless reflect those of the extremely poor[34] in other areas of the nation.[35] More or less on the margin of

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31. In addition, at least four panhandlers appeared to use marijuana on occasion.

32. *See generally* William Finnegan, *Out There*, THE NEW YORKER, Sept. 10, 1990, at 51, Sept. 17, 1990, at 60 (narrating the experiences of a black adolescent in New Haven, with anecdotal information about the city's crack market).

33. *See infra* notes 71-72 and accompanying text.

34. Rossi defines single individuals as "extremely poor" if they have an annual income of "three-quarters or less of the current official poverty line," which amounted to $4,000 in 1988. ROSSI, *supra* note 1, at 13. The category of extremely poor, which includes those who have housing, is chosen for these comparisons instead of the category of "homeless" because many of the panhandlers interviewed *were not homeless. See infra* notes 37-43 and accompanying text. Nevertheless, it should be noted that with panhandling income and welfare benefits, several of the panhandlers may have had more than $4,000 in income during 1991. *See infra* notes 66-68 and accompanying text.

35. The racial composition of the interviewees echoes Rossi's determination, based on the 1987 Current Population Survey ("CPS"), that African-Americans are overrepre-

survival, it is perhaps not surprising that the individuals described here might end up panhandling. This leaves unexplained, however, the specific circumstances that led them to ask for handouts. Those circumstances are explored in the next Part.

II. Obtaining Necessities: Why Panhandle?

This Part describes where and through what means the panhandlers found shelter, ate, and obtained medical care and other necessities. Despite the generally bleak circumstances described in Part I, a majority of the panhandlers were not homeless. Many received welfare benefits of some type, as well. Finally, most benefitted from New Haven's system of soup kitchens, free health clinics, and shelters. Given these circumstances, the regular panhandlers' decision to solicit donations, generally constituted a response to two distinct wants: (1) food, particularly of a greater variety and perceived quality than that available through institutional charity; and (2) alcohol or drugs.[36] This Part considers the role of panhandling income within the broader context of the other means the panhandlers relied on to obtain basic necessities.

A. Shelter

Among the most surprising findings was that the majority of panhandlers on York and Broadway were not homeless[37]—surprising because

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sented among the extremely poor. *See* Rossi, *supra* note 1, at 125. The age and gender of the regulars also reflect the findings of broader studies on the extremely poor. The 1987 CPS determined the average age of the extremely poor to be 37.4 years, *id.* at 121, Table 5.2.D., while a study of Chicago's domiciled extremely poor found that 68.4% of those dependent upon General Assistance were male. *Id.* at 118, Table 5.1.C. The regulars' marital status also approximated findings of broader studies. The 1987 CPS found that only 4% of the extremely poor were currently married and not separated. *Id.* at 129, Table 5.6.D. Finally, two of the twelve regulars clearly suffered from mental illness. Data on mental illness among the homeless is more widely available than similar data for the extremely poor; recent research suggests that approximately one-third of the homeless are mentally ill. *See* James D. Wright, *The Mentally Ill Homeless: What is Myth and What is Fact?*, 35 Soc. Probs. 182 (Apr. 1988).

36. In addition to food and drugs, the panhandlers spent a small percentage of their income on several other items. Five mentioned purchasing "personal items" such as toothpaste and shampoo, and paying for washing clothes at area laundromats. Five, at least, also spent money on cigarettes. None of the panhandlers said that they saved any of the money they received. Most, particularly those who had been robbed, *see infra* text accompanying note 72, were concerned with immediately spending what they had brought in.

37. In connection with this finding, it bears noting that the director of the Community Soup Kitchen on Broadway in New Haven estimated in 1989 that only 25 percent of the clientele were homeless. Allison Heo, *Community Soup Kitchen Serves Hungry, Homeless of New Haven*, Yale Daily News, Jan. 30, 1989, at 1.

the image of a panhandler typifies, indeed helps to define, prevailing conceptions of the homeless.[38] As defined by Rossi, homelessness "means not having customary and regular access to a conventional dwelling."[39] Eight of the twelve interviewees were not homeless by this definition, and they did not use income from panhandling to maintain their living quarters. Six of these eight lived in apartments paid for entirely by Connecticut's General Assistance program, operated locally by the New Haven City Welfare Department.[40] The interviewees' rents varied from about $300 to $325 per month.[41] The other two panhandlers who were not homeless lived with relatives. Chip, one of the mentally ill interviewees, lived with his mother in New Haven; Ricky split time living in New Haven with his sister (a part-time nurse's aid and mother of two, receiving Aid for Dependent Children benefits) and in Hamden with his brother (who was disabled and lived primarily on Supplemental Security Income benefits).

The other four panhandlers were homeless, and survived by relying on shelters, friends, and sleeping outdoors. All four used shelters in New Haven to some extent, particularly in the winter. Two, Lou and Barry (who was mentally ill), had spent from mid-October 1990 to April 1991 in various New Haven shelters, particularly the Crown Street shelter several blocks from the York district. Both apparently slept outside during the summer. Two more panhandlers, James and Terry, used shelters in the winter less regularly. James spent two or three nights each week at his girlfriend's apartment, while Terry paid fifteen dollars a night to sleep in a friend's apartment, when he could afford it.[42] Terry

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38. Indeed, the recent law review commentaries treating panhandling as a First Amendment issue routinely assume that panhandlers are usually homeless, and that the homeless are usually panhandlers, dual assumptions of dubious accuracy. *See, e.g.*, Knapp, *supra* note 8, at 423 (suggesting that cities' interest in enforcing "antibegging statutes is to hide the problem of homelessness from the eyes of the public"); *id.* at 406 ("a common activity of most homeless persons is begging, or panhandling, for sustenance"); Rose, *supra* note 8, at 191-92 (presupposing that panhandlers are homeless); Johnson, *supra* note 10, at 978 (banning panhandling "may prevent many people from learning about the prevalence and plight of the homeless"). Empirical evidence from the Chicago Homeless Study suggests that only about one in three homeless persons panhandles. *See* Rossi, *supra* note 1, at 108, 110.

39. Rossi, *supra* note 1, at 10.

40. Three had apartments with kitchens, while three stated they had only single rooms with a common area and a bathroom.

41. At least five of the six in city-subsidized apartments fulfilled a workfare obligation to "pay" their rent. *See supra* notes 17-19 and accompanying text. Keith, the sixth, claimed that he was disabled and could not work, and therefore had no workfare obligation.

42. When Terry could not pay the nightly rent, he would sleep in a shelter or outdoors (perhaps twice a week).

was the only person who used panhandling income to obtain shelter. Terry and James, like Lou, also planned to sleep outside during some part of the summer. Those panhandlers who had spent significant time in a shelter before being interviewed were extremely negative about shelter life. They particularly disliked the lack of privacy, and generally feared for their personal safety. "Me and shelters," Terry declared, "do not get along."[43]

B. Food

Every panhandler interviewed received either government or private institutional support (or both) to obtain food, and most of the panhandlers also spent the majority of their panhandling income on food. Indeed, eight of the panhandlers said that the fundamental reason they panhandled was to obtain "more food" or "better food."

All the regulars relied, to some extent, on meals served by soup kitchens and shelters.[44] Commenting on the wide availability of meals most days in the area, Ricky remarked, "Ain't nobody go hungry in New Haven." The panhandlers routinely complained that the food at certain (but not all) kitchens or shelters, particularly the Community Soup Kitchen on Broadway, was unpleasant to eat and gave them stomach problems.[45] Four received perhaps two dinners a week from kitchen staff at Davenport College, one of Yale's residential colleges. Finally, two panhandlers, Fred and John, relied on a local pantry once or twice a month, where they received crackers, cheese, and other simple foods.

Government assistance complemented this private aid. Seven of the twelve regulars[46] received General Assistance payments of $58.90 every two weeks from the city of New Haven, and three of those seven also

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43. Research indicates that the homeless generally have mixed feelings about shelter life. *See, e.g.*, Rossi, *supra* note 1, at 101-02 (73% of homeless interviewed in 1986 Chicago survey considered shelters to be the "only places" where homeless "can get a decent night's sleep," but 47% of interviewees were "concerned [about] the lack of physical safety and the presence of theft").

Ricky, one of the panhandlers who was not homeless, said that he could not "understand fools not using a shelter for themselves like they got here in town. You get a meal, a bed, you watch t.v.—all you have to do is leave by seven [in the morning.] What's the problem?" Ricky had never slept in a shelter, which perhaps explained his view.

44. In any given week, kitchens and shelters provided three of the regular panhandlers with two or three meals, six of the panhandlers with four or five meals, and served three panhandlers up to about ten meals.

45. The author sampled a meal of chicken, broccoli, beans, and rice from the Community Soup Kitchen, and found it quite unappealing.

46. Six of these seven lived in city-subsidized apartments. *See supra* text accompanying note 40.

received between $50 and $75 per month in food stamps from Connecticut's Department of Income Maintenance.[47] Although the panhandlers mostly used their food stamps and General Assistance income (which was earmarked for food and other necessities[48]) to purchase food at grocery and convenience stores and restaurants, at least four spent part of their General Assistance payments on alcohol or drugs, and one, Keith, sold almost all his food stamps at a discount for cash, to buy alcohol.[49]

For most regulars, panhandling was primarily a supplement to the aid provided by soup kitchens, shelters, and government benefits. Eight of the twelve panhandlers said that the primary reason they panhandled was to obtain more food than they could afford on their welfare budgets and/or to obtain better food than that available in soup kitchens and shelters. The same eight stated that they spent more panhandling money on food than on any other item.[50] This finding is not surprising, given the routine complaints about several of the soup kitchens, the modest amount of welfare benefits received by some, and the fact that others apparently received none at all. All those who used their panhandling income primarily for food spent most of it in York district restaurants.[51]

C. Drugs and Alcohol

Whether alcohol or drugs constitute a "necessity" depends, it seems, upon who answers the question.[52] As described above, at least four

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47. It remained unclear why several of the panhandlers receiving General Assistance did not also receive food stamps, given that those who were eligible for the former were almost always eligible for the latter as well. Telephone interview with Peter Vaiuso, Intake Supervisor, Connecticut State Department of Income Maintenance, in New Haven (Mar. 30, 1992).

48. "Needs usually covered by General Assistance include . . . food, personal items, and household supplies." CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE, QUESTIONS & ANSWERS ABOUT GENERAL ASSISTANCE IN CONNECTICUT 3 (Sept. 1987).

49. Several panhandlers indicated that selling food stamps at a cash discount was common. This assertion remains unverified.

50. Panhandling income levels are discussed in greater detail in Part III. *See infra* text accompanying notes 66-67. To summarize, the six panhandlers in the "middle" category raised between $100 and $250 per week; the four panhandlers in the "low" category brought in less than $50 per week; and the two in the "high" category raised around $300 per week.

51. Adding modestly to the panhandlers' sources of food were two other forms of individual charity. First, most of the panhandlers received a number of food donations from passersby. Further, five of the panhandlers received, on an individual basis, a modest amount of under-the-table handouts from particular restaurants. This second form of gift is discussed in greater detail in Part III. *See infra* notes 138-39 and accompanying text.

52. A nationally syndicated columnist recently wrote, in reference to the now

panhandlers were alcoholics, three more strongly desired alcohol, and at least two panhandlers suffered serious drug addictions. The regulars spent a significant amount of their panhandling income (as well as their government money) on alcohol and drugs.

Four regulars (two alcoholics, Keith and Linda, and the two confirmed crack addicts, Sandy and Lou) either said or implied that all or nearly all of their panhandling income went to support their addictions. Keith, for instance, explained that his biweekly $58.90 in General Assistance aid, coupled with his money from panhandling,[53] bought him enough alcohol "to get by," which seemed to mean almost constant drinking. Similarly, Sandy stated that he bought crack with nearly all of the $300 a week or more that he earned on the street.[54] Many other regulars used a significant portion of their panhandling income to buy alcohol. Terry and Chip apparently spent at least half of their income on liquor, while three other regulars spent at least one-quarter on alcohol (all by their own estimate).

D. Medical Care

Many of the panhandlers received medical care, although its quality and frequency remained unclear.[55] Seven of the twelve relied on free medical assistance provided by a nearby clinic, Hill Health Center. Two, John and Lou, received medical attention at a Veteran's Hospital in West Haven, several miles away. Finally, three panhandlers said they had no access to medical assistance, although one of them, James, explained that he went to Yale-New Haven Hospital if he was really sick. Although he could not afford to pay for treatment, he said that

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obsolete living arrangements known as "Skid Rows":

> These neighborhoods didn't look nice, but they had many conveniences: low-cost diners, liquor stores . . . cheap [rooms]. So a wino could panhandle a few hours a day and then return to Skid Row and find *the basic necessities:* food, *drink* and housing.

Mike Royko, *Homeless Crusade is Do-Gooders' Flop*, CHI. TRIB., Dec. 27, 1990, § 1, at 3 (emphasis added).

53. Perhaps less than $50 each week.

54. In an extraordinary display of (hopeless) self-paternalism, Sandy confided that he was desperate to find a person or institution to manage his money so that he would not waste it on crack. In the past, he had made agreements with an older woman in Hamden and with the manager of a New Haven nightclub to hold his money for him, but neither arrangement had lasted. When Sandy could wait no longer to buy crack, he had threatened to kill them if they did not give the money back to him.

55. Ten panhandlers appeared in reasonably good physical health when interviewed (one of the ten, Ricky, still had cuts and bruises suffered in a recent mugging). Chip and Linda both appeared weak; Linda, from years of heavy drinking, Chip, apparently from both drinking and drugs.

the hospital had cared for him on the several occasions when he had gone. Most recently, they had provided him outpatient care for influenza during the winter of 1990-91.

Treatment for chemical dependency was less satisfactory. At least four panhandlers had undergone short-term drug or alcohol rehabilitation in the last several years. This involved emergency three- to seven-day inpatient treatment programs paid for by the state of Connecticut.[56] Of the four, only one (Terry) had made progress battling his dependency, but he feared he could not continue "beating that drink." According to a psychiatric social worker at the Connecticut Mental Health Center in New Haven, addicted panhandlers faced a two-fold problem: first, they needed longer inpatient treatment, which was usually unavailable because of space and budget constraints; and second, the outpatient programs available to them usually were not sufficient to prevent recidivism, in part because after inpatient treatment, the panhandlers immediately returned to the environment in which they had been addicted.[57] The social worker failed to mention an additional factor: the welfare payments and panhandling incomes of these regulars, which enabled them to continue—or resume—financing their drug or alcohol use.[58]

In sum, the panhandlers of the York district relied on various combinations of state and local government benefits, city shelters, soup kitchens, and free medical assistance to maintain a marginal existence. Panhandling income played an important role for the regulars, providing them food, alcohol, and drugs. Thus, it should not be surprising that most of them devoted significant effort to obtaining this income. These efforts are explored in the next Part.

III. The Strategic Components of Panhandling

For most of the twelve regulars who panhandled in the York district, soliciting pedestrians for handouts was not a haphazard activity. The

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56. Telephone interview with Susan House, Psychiatric Social Worker, Alcohol Treatment Unit, Connecticut Mental Health Center, in New Haven (Apr. 2, 1992).

57. *Id.*

58. The study did not examine in any depth the treatment possibilities available to the mentally ill panhandlers. The Entry Crisis Division of the Connecticut Mental Health Center ("CMHC") provided free walk-in service to those who came in voluntarily for treatment. The Yale and New Haven police had authority to bring an individual to the Psychological Evaluation Unit at Yale-New Haven Hospital ("YNHH") if that person posed a bona fide threat of harm to himself or others. The Psychiatric Evaluation Unit of the Emergency Room at YNHH would evaluate the individual, and under certain circumstances, would send them to CMHC for treatment. A nearby shelter, Columbus House, which provided various services to the homeless, retained a mental health worker on its staff who occasionally referred individuals to CMHC. Telephone interview with Beryl Carr, Mobile Crisis Team Member, Connecticut Mental Health Center, State of Connecticut Department of Mental Health, in New Haven (Mar. 30, 1992).

lucid panhandlers adopted various forms of strategic behavior to increase their panhandling income.[59] In contrast, the mentally ill regulars (Chip and Barry) and the most severe alcoholic, Linda, did not panhandle with much care. The behavior of this latter group constitutes a sharply contradicting, offhand approach to panhandling that perhaps represents the stereotype of the frighteningly unpredictable street person.[60] This Part of the study focuses on the nine regulars of the York district who panhandled in a fairly "professional" manner, with some reference to the other panhandlers. After briefly discussing the area where the regulars panhandled, as well as their income and how long they had worked the street, this Part focuses on the various components of panhandling strategy, particularly the choices of location and time, and the approaches taken in interacting with pedestrians. The Part concludes with a brief analysis of those pedestrians that gave donations to the panhandlers.

A. The Setting

1. The York District: People, Pizza, Police.—The intersection of Broadway and York Streets in New Haven, where the panhandlers asked for handouts, has several distinctive features.[61] First, and most important, the streets border the campus of Yale, a wealthy private university with a relatively liberal student body of over 10,000. The eastern side of York is dominated by dormitories and the main library of Yale. The students heavily patronized the roughly 30 businesses on Broadway and on York's western side, comprised largely of restaurants, convenience food stores, clothing stores, and other businesses targeted at the college community. Second, the York district had significant pedestrian and automobile traffic throughout the day, and a vibrant nightlife largely due to Toad's Place, a nightclub with live music, and Demery's, a popular bar. Several of the restaurants served large numbers of customers

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59. It should be emphasized that this claim rests on empirical research, and is not deduced from the assumption that the panhandlers were rational, self-interested individuals, seeking to maximize either their income, or some broader utility function.

60. *See, e.g., infra* note 78.

61. York Street runs north-south, while Broadway runs west from York. Broadway becomes Elm on the east side of York Street. Parts III and IV refer by name to several businesses, including, on York's western side (running from north to south), Toad's Place (a nightclub), Yorkside Pizza, The Game (a clothing store), Ashley's ice cream store, Demery's (a bar and restaurant), and, across Broadway, WaWa's convenience store, J. Press clothing store, and Davenport College, a Yale residential college. Located on the northern side of Broadway are, among other businesses, Subway sandwich shop, Store 24 convenience store, Cutler's Records, Quality Wine Shop, B. & H. Raphael Jewelers, Broadway Pizza, York Square Cinema, and the Yale Co-Op bookstore.

after 11:00 p.m., mostly Yale students and bar patrons. Third, New Haven and Yale police patrolled the area heavily, on foot and by car. The New Haven police had an officer on foot patrol twenty-four hours each day in an area that included the York district, with additional support from a patrol car.[62] The Yale police had similar arrangements.[63]

2. The Regulars.—Although the York district had transient panhandlers who appeared for several days and then moved on,[64] the regulars seemed to have established themselves semi-permanently in the area. Nine of the twelve regulars had worked the York district for at least one year, the minimum period being three months (Chip), and the maximum being nearly seven years (Keith). Only three regulars, however, said they had panhandled on York and Broadway for more than two years. As discussed, most of the regulars claimed to be looking for work, but there was little indication that they were prepared to cease their routine on York and Broadway in the foreseeable future.[65] Only one of the twelve regulars, Terry, had left the area in the six months prior to the study's interviews, and he had returned after only six weeks.

The regulars may be categorized according to three income levels: high, middle, and low. The high-income category included Sandy and Dave, who had both panhandled in the past, but had started selling roses as an alternative. They earned between $30 and $80 a day, regularly exceeding $300 a week.[66] The middle category, the largest, had six members. These six regulars—Ricky, John, Terry, James, Fred, and Lou—generally fit the traditional image of a panhandler sitting or standing on the street asking for change. They earned between $20 and $50 each day they panhandled, sometimes more, and between $100 and $250 per week.[67] The low-income group included four regulars. Three of them,

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62. Interview with Ron Oates, Sergeant, New Haven Police Department, *supra* note 30.

63. *Id.*

64. Transient panhandlers arrived in and departed the York district at the rate of perhaps two or three a week. This figure derives from estimates by police and by several regulars. This Part almost exclusively examines the panhandling of the regulars; Part IV explores the interaction between regulars and transients.

65. When a later draft of this Article was completed in March 1992 (nearly a year after the initial interviews with the panhandlers), ten of the twelve regulars were still panhandling in the York district.

66. Their activity resembled panhandling closely enough that they remained in the study. *See infra* notes 89-92 and accompanying text.

67. Anecdotal evidence from other sources finds similar or higher levels of panhandling income. *See* Douglas Platt, *Pass New York Panhandlers By*, N.Y. TIMES, July 30, 1988, at A25 (executive director of "drop-in center" for extremely poor and homeless in New York City reports that several clients made "$70 a day" and notes information about another panhandler "whose artful pleas have raked in over $200 in one day");

Barry and Chip (who were mentally ill) and Linda (who was always drunk) earned little, averaging from $1 to $10 a day, and generally less than $50 a week. They had far less contact with pedestrians than did the middle-income group, spending hours at a time on the street disconnected from reality or asleep. Keith, the fourth member of the low group, only panhandled two to three times a week.[68]

B. Panhandling Strategies

1. Why the York District?.—Although there are several business areas in downtown New Haven, the regulars favored panhandling in the York district for two interlinked reasons: (1) the number and type of people who frequented the district; and (2) the security for both pedestrian and panhandler.[69] The regulars explained that they were primarily attracted to the York district because of the large number of pedestrians. Pedestrian traffic was relatively heavy from noon until six in the evening, and then increased significantly during the evening hours, often until nearly two in the morning, when the bars closed. Moreover, nearly every regular favorably mentioned the high percentage of Yale students who patronized the York district businesses. "These students—very generous, very generous," said Fred. "They'll give you everything." Several regular panhandlers added that beyond attracting pedestrians to the York district,

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Howard W. French, *At Penn Station, an Oasis for the Homeless*, N.Y. TIMES, Mar. 30, 1988, at A1 (reporting crack addict who claims "he is able to take in $100 a day, or enough to satisfy his crack habit and have enough left over to eat").

68. Keith relied on soup kitchens and shelters for most of his meals, and used nearly all of his General Assistance benefits to drink. When he ran out of money to buy liquor (usually the few days before his next check), he either panhandled for short periods, or collected returnable bottles and cans.

69. "Comparison panhandling," which Terry did on Chapel Street and then on Broadway before choosing the latter, may well be common. *See, e.g.*, Joseph Berger, *About New York: All of New York's Tumult Jammed into a Terminal*, N.Y. TIMES, Dec. 28, 1991, at A23 (describing individual who had done "comparison panhandling at Grand Central [Station] and Port Authority Bus Terminal, [and had] determined that 'the East Side [Grand Central] is more compassionate than the West Side [Port Authority]'").

Several of the panhandlers stated that there was little panhandling in the poorer areas of New Haven. This assertion remains unverified. Interestingly enough, some evidence suggests that those less well off are more generous in their giving. *See, e.g.*, Linda R. Gibbs, *Begging: To Give or Not to Give*, TIME, Sept. 5, 1988, at 68, 73 ("[M]any panhandlers find that the poor are more generous than the rich."); *see also* Eloise Salholz, *The Empathy Factor*, NEWSWEEK, Jan. 13, 1992, at 23, 23 ("Curiously, those who have the least give the most."). Virginia Hodgkinson, vice president for research at the Independent Sector, reports research findings indicating "that the very wealthy are the most likely to stop contributing during economic hard times, where as 'people with less participate more, because they are much closer to knowing what it feels like to lose a home or job.'" *Id.*

the many businesses enhanced the amount of giving because so many shoppers left stores or restaurants with change in hand when the panhandler greeted them. The restaurants proved advantageous for another reason: some pedestrians either went in to buy food for the regulars, or gave them leftovers from a meal, such as a slice of pizza.

The York district panhandlers also favored the area because of the security it offered to both the pedestrians *and* the panhandlers themselves. The regulars had found that people felt safe in the district, relatively speaking,[70] because the area was so heavily traveled by shoppers and patrolled by police. Most people, the panhandlers observed, did not seem to feel threatened when asked for money, even past midnight. Lou, keenly aware of how his appearance and request might be threatening in other contexts, pointed out the York district's appeal with a contrast: "How [would] you feel if me, some shabby dude, walked up to you and asked for money in a dark alley? [For me to do that] would be stupid!"

The panhandlers, too, felt more secure in the York district than in many other parts of New Haven because of the pedestrian traffic and the police presence.[71] Many of the panhandlers had been victims of violent crime in the past, and feared being attacked again. In fact, although they considered themselves safe while panhandling in the York district, many panhandlers faced safety problems when they wanted to go home. Nearly all the regulars who were not homeless lived in dangerous areas of New Haven, where the sound of gunshots was commonplace, and walking at night was hazardous. Ricky, for instance, had suffered a beating by five youths with a baseball bat late one evening in January 1991. He had spent three days in Yale-New Haven Hospital, and still owed the medical bills when he was interviewed. Several of the panhandlers attributed such misfortunes to being a well-known panhandler. Ricky and John explained that groups of younger kids expected them to be carrying money at night.[72] Fear of being assaulted had led two regulars to stop panhandling late at night, and one of the most successful regulars, Sandy, sometimes took a cab back to his apartment past midnight.

2. Clock and Calendar.—Panhandling income varied significantly among the regulars, particularly the medium group, according to several

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70. New Haven is a particularly unsafe place to live. Despite a population of only about 130,000, there were over 30 murders in New Haven in 1991, and Yale University has spent millions of dollars in recent years on security. *See* Joshua P. Galper, *Security Measures Improved, But Yalies Remain Insecure*, YALE DAILY NEWS, Mar. 2, 1992, at 3.

71. The panhandlers' complex relationship with the police is primarily discussed in Part IV, but will be mentioned when relevant in this Part.

72. Police officers corroborated this assessment. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30.

factors. Income depended greatly on the time of day and the number of hours a regular panhandled. The average of the nine regulars (in the middle and high groups) was approximately five hours a day, four days a week; individual efforts varied from four hours a day, two or three times a week to seven or eight hours a day, six days a week. Most panhandlers followed routine schedules, such as from 6 to 11 p.m., Wednesday through Sunday. Their schedules seemed to be influenced by several variables, including personal habit, soup-kitchen dining hours, workfare responsibilities, and social commitments.[73] Only one member of the middle and high groups, Lou (who was homeless and a drug addict), said that his hours were dictated solely by when he needed money (which generally went to buy crack).

Perhaps the most critical factor determining a regular's schedule was the ebb and flow of donations over the course of the day and the week. Panhandling was most profitable at three times of the day. First, from about 3 to 5 p.m., when many students tended to run errands; second, from about 6:30 to 8:30 p.m., when restaurant-goers finished dinner, and students came to buy food and drinks for evening studying; and finally, from 10 p.m., when the bar crowds began to congregate, often outside on warm nights, until perhaps 2 a.m., when bars and late restaurants closed, and most pedestrians left for the night.[74] The late hours were particularly lucrative because the largest number of people were on the street then, and (after spending the evening out, often drinking) they were generally friendlier and more likely to give than shoppers during the day. Several panhandlers remarked that passersby who had drunk a lot were often generous. According to Lou, a pedestrian who might have given him a quarter earlier in the evening would give him two or three dollars after drinking, while a person who gave nothing during the day might offer a dollar. The late night boost in donations thus presented each regular with a dilemma: whether to leave the York district earlier and face a reduced "take" for the evening, or stay on the street and risk possible attack on the way home.

A panhandler's success also varied by the day of the week. Handouts on Wednesday through Saturday were greater than during the rest of the week, partly because Toad's Place and Demery's attracted large crowds, usually on those nights, with events such as live concerts. The cycle of the academic year was important as well, because when Yale

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73. Ricky, for instance, often had dinner with his brother or sister at home around 6 or 7 p.m.; John usually ate dinner with his live-in female companion around the same time.

74. Noting that many of the regulars began panhandling near dinner time, one business owner observed that "as soon as the sun goes down, they come out." Interview with Chuck Caldwell, Owner, The Game, in New Haven (Apr. 1, 1992).

students left for the summer, the middle- and high-income groups suffered up to a fifty percent decrease in earnings (for example, a Thursday evening might fall from fifty-five dollars to twenty dollars). "The summer?" James asked. "Forget it. I'm lucky to bring in about half of what I usually get." The panhandlers were thus acutely conscious of Yale's academic calendar. Several referred to September as "the beginning of the year," and others even knew the dates of Yale's exam and reading periods.

As might be expected, certain holidays yielded great income increases. Those pedestrians who usually gave to the panhandlers gave much more, and those who rarely gave often became generous. Thanksgiving, and especially Christmas, were the most important holidays. James, who stood near the Store 24 convenience shop on Broadway, saw his daily earnings increase nearly 300%, from about $40 to upwards of $120, in the two weeks leading up to Christmas. He found himself, he said, "with a ton of cash." He made sure to panhandle every day during that period, as did Fred, who was deluged with hot chocolate and candy canes from students shopping at the WaWa convenience store three doors down from where he sat. Others echoed James's comments, saying they usually received at least double their intake in late December. Ricky put it this way: "Ahhh, Christmas. Christmas is *good*."

Two additional factors affecting the regulars' panhandling schedules were welfare benefits and pride. First, those panhandlers who received General Assistance benefits or food stamps often stopped panhandling for several days when they obtained their benefits (food stamps were issued at the beginning of the month; General Assistance checks, the first and fifteenth days of each month). One Yale police officer noted that a sudden increase in alcohol consumption among certain panhandlers, and a concomitant decrease in panhandling efforts, occurred "almost like clockwork" with the issuing of benefit checks. "We always know who just got his check," she said.[75] Another reason for interruptions in panhandling routines was less material. Ricky, Lou, Fred, and especially Terry, all of the middle-income group, pointed to feelings of pride as a reason for cutting back their hours at various times. Lou explained that at times he could only panhandle when his "hunger" (here, meaning for drugs) exceeded his pride.[76] Terry, having just begun to panhandle again after temporarily being employed for six weeks, was

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75. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30. This cycle was repeated in soup kitchens as well. *See* Heo, *supra* note 37, at 1 ("[M]ore people visit [the Community Soup Kitchen on Broadway] toward the end of the month, when they have used up their welfare or Social Security checks.").

76. Lou's analysis of many of his experiences was quite sophisticated. He often spoke much like a neoclassical economist, as this last point suggests.

particularly affected. He remarked several times, "It's that *pride* feeling."

3. "Same Face, Same Place": Marketing Strategies.—Sociologists have found that panhandlers rely on strategic behaviors to increase donations.[77] The York district panhandlers were no different in this regard, and the regulars had evolved a distinct way of doing "business" with pedestrians. Members of the middle-income group all relied on a basic approach to panhandling, with some variation, of (1) expressing deference and gratitude to passersby while (2) remaining stationary in a specific piece of territory within the York district.

The lucid regulars uniformly agreed that successful panhandling depended, first and foremost, on conveying strong messages of respect for, and gratitude to, pedestrians.[78] Seven of the nine regulars specifically and repeatedly used the word "respect" in describing their dealings with passersby. Ricky, who elaborated on his panhandling philosophy at length, started with the fundamental point that "they're not asking you, you're asking them." He greeted every person who passed with a polite question, such as "How are you doing today, sir (ma'am)?" He considered it both unnecessary and rude to ask for a handout. "They know why you're sitting here," he said. "You don't need to say anything about money." Ricky was always cheerful when he panhandled, and he worked to make eye contact with people. When a person gave him something, no matter how small, he thanked them very politely. Moreover, if people ignored him or, on rare occasion, were abusive toward him, he still would say, "Have a good day," without a hint of malice or sarcasm. Ricky's efforts at remaining friendly and polite were echoed by all the middle-income panhandlers: John, James, Terry, Fred, and Lou. For example, James and Terry, who typically asked "Could you

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77. *See, e.g.,* George Gmelch & Sharon B. Gmelch, *Begging in Dublin*, 6 URB. LIFE 439, 443 (1978) ("The most elementary strategy in begging is to maximize the sympathy felt by prospective almsgivers through 'impression management' . . .; that is, beggars manipulate their appearance and manner in order to dramatically convey poverty and need.") (citation omitted); Horacio Fabrega, Jr., *Begging in a Southeastern Mexican City*, 30 HUM. ORG. 277, 285 (1971) (describing how panhandlers "manifestly display and use their disability in order to elicit support").

78. The regulars' tremendous concern with not offending or frightening pedestrians sharply contrasts with the flood of news and magazine articles that describe, often in vivid detail, a perceived increase in aggressive panhandling. *See, e.g.,* Priscilla Painton, *American Scene*, TIME, Apr. 16, 1990, at 14, 14:

> At 5 p.m. the rush-hour ticket line at New York City's Port Authority Bus Terminal wove through the customary wretched carnival of mendicants. One beggar whirled like a crazed ballerina from commuter to commuter, caressing people's shoulders and prodding their bellies with a beseeching hand. Another rolled his wheelchair up against the commuters' feet and tugged at their sleeves. A third stretched across a counter in a weirdly feline gesture, trying to intercept the change coming back to [a commuter].

spare some change please?" both said "God bless you anyway" when their requests were rejected.[79]

Conveying respect and gratitude appeared to yield a number of advantages for the panhandlers. First, several regulars reported that some pedestrians who ignored their initial request for a donation would decide to give if, even after being rejected, the panhandler remained polite and friendly. For instance, the author witnessed Lou ask an older, well-dressed woman for a quarter. Though initially she had appeared frightened, and had walked by quickly, she turned around and gave him a dollar after he warmly said, "Thank you anyway." Second, several panhandlers pointed out that their relationship with the community on York and Broadway was long-term.[80] They stated that they were building a reputation with many different people, some of whom would only give after seeing them on the street for several weeks. The panhandlers' respect represented an investment with these people, who might later become relatively frequent givers, or even "patrons."[81]

The regular panhandlers relied on a variety of subordinate strategies that revolved around the basic concept of respect. Most of the regulars stressed the importance of not touching pedestrians, especially women. Physical contact, they repeatedly stated, severely upset people. The panhandlers also tried to sound as upbeat as possible when they spoke to passersby, believing, in John's words, that "no one wants to be dragged down." Several thought that they should appear as presentable as possible. Ricky and Fred said they tried to maintain a clean appearance when they panhandled, Fred advising that passersby "didn't want to deal with dirty human beings."[82] He and Ricky also shunned a cup to

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79. References to God were found to be pervasive in a study of panhandling in Dublin, and also "appear[] to be common among beggars in other cultures." Gmelch & Gmelch, *supra* note 77, at 445.

80. This observation suggests that the panhandlers did not expect to change their circumstances in the immediate future.

81. "Patron" refers to a particularly generous repeat giver. *See infra* notes 97-100 and accompanying text.

82. This emphasis on appearing conventionally presentable runs counter to the strategy one might expect of attempting to appear forlorn and in need, an approach researchers have found in other communities. *See, e.g,* Gmelch & Gmelch, *supra* note 77, at 444 (discussing panhandling strategy in Ireland of "don[ning] a begging uniform of soiled and tattered clothing").

It further bears noting that the regulars generally criticized faking an injury or disability. Keith pointed out that "people aren't that stupid"; Lou agreed, saying "they know what you're doing." Henry Mayhew memorialized this panhandling strategy among many, many others in his exhaustive, even mind-numbing, typology of panhandlers and the extremely poor. *See* 4 HENRY MAYHEW, LONDON LABOUR AND THE LONDON POOR 24 (Dover ed., Dover Publications 1968) (1880) (referring to those "[h]aving . . . pretended sores").

collect money, which they considered demeaning to them and offensive to pedestrians. Each opted merely to hold out his hand, but only after someone had offered a donation. Finally, similar to Ricky, several of the regulars never directly asked for money, instead merely greeting passersby.[83]

The second element of strategy, almost as prevalent among the panhandlers as showing respect toward pedestrians, was the possession of territory. All of the middle-income regulars, with the exception of Lou, panhandled in relatively clearly demarcated "spots"[84] adjacent to one or more of the particularly successful businesses in the York district.[85] Several benefits flowed from possessing a spot. The panhandler in a particular spot was usually the first to greet customers leaving the nearest store with change in hand. James and Terry, for instance, shared an indentation in the wall next to the Store 24 entrance that provided immediate access to all who went to the convenience store, as well as shelter from wind and precipitation. In addition, holding a spot ensured that a panhandler's "patrons"—those who regularly and generously gave to him[86]—knew where to find him. Ricky explained, "When [patrons] want to stop by, they know where I am. Now you know, too. Same face, same place." Panhandling in a spot also helped to form patron relationships. Several regulars observed that pedestrians who had become generous givers over time grew to know the panhandler partly by as-

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83. One variation practiced only by John bears special mention. In February of 1991, he began to bounce his cup up and down, chanting "Howyadoin?" in rhythm with the cup's jangle. He soon became the best-known panhandler in the area, and for a period in the spring of 1991, whole groups of students could be seen sitting next to him on warm nights in front of Demery's, chanting "Howyadoin?" in a long line, crossing their legs back and forth in time with his chant. John reported that his average intake had increased tremendously, from perhaps $30 to $60 a day, since beginning "my little number."

John's attempt to distinguish himself from the other regulars by using entertainment and humor appears to be a common tactic elsewhere. *See, e.g., In Chill of the Night, the Homeless Change Habits*, N.Y. TIMES, Jan. 21, 1992, at B3 (describing panhandler "who calls himself Gumby the Frame Man—his usual panhandling trick is to stand with a picture frame around his face and say, 'I've been framed'"); Ian Fisher, *Enterprise of Being Homeless*, N.Y. TIMES, Dec. 24, 1991, at B1 (story of panhandler "saluting at car windows and incanting the almost-rhyme: 'Merry Christmas. Nickel, dime to give us?'").

84. The regulars all used this term.

85. Ricky sat on a low wall bordering Yale's Hall of Graduate Studies, near Toad's Place; John sat between Ashley's ice cream and an empty storefront next to Demery's bar; James and Terry alternated between a niche in the wall next to the Store 24 convenience store and a driveway between the Quality Wine Shop and York Square Cinema; Fred sat on a low wall two doors down from the WaWa convenience store.

The actual dynamics of acquiring a "spot," while somewhat unclear, appeared to involve returning to the same place (one not already occupied) to panhandle on a routine basis (at least several days a week) for perhaps a month or more.

86. *See infra* notes 97-100 and accompanying text.

sociating him with a particular spot.[87] Finally, holding a spot gave a panhandler a sense of "place" with familiar surroundings, fulfilling a need similar to that expressed by individuals returning to the same seats in group meetings and in classrooms. Referring to the idea of familiarity, John simply said: "This is just where I am. This is the right place."[88]

4. Other Sources of Street Income.—Although the large majority (nine) of the regulars relied solely on traditional panhandling for their street income, three panhandlers had found other ways to raise money.[89] Dave and Sandy began selling roses several months before being interviewed, because it proved considerably more profitable, and they disliked simply asking for handouts. Nevertheless, like the traditional panhandlers, their small-time enterprising depended significantly on the generosity of others: the local florists who sold them roses, often at great discounts,[90] and the pedestrians who bought the flowers, which were sometimes in poor condition. Generally charging $3 for one rose and $5 for two, Dave and Sandy made significantly more than the other York district regulars. On a slow day, they might earn between $20 and $40; on a busy weekend night, up to $100.[91] Curiously, although the middle-income

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87. John once described the surprise a patron expressed when finding him eating lunch outside of Broadway Pizza, nearly a block from his usual spot. The patron, he said, looked almost shocked, and asked, "Hey, what are you doing *here*?"

88. Lou and Keith placed less emphasis on territory than the other regulars, but both seemed to depend on it somewhat. Keith, although he panhandled less than others, almost always went a few blocks away to Naples Pizza when he did ask for money. This choice partly reflected his belief that the police officers would not let him panhandle in the York district. (For the relationships between panhandlers and police generally, see *infra* Part IV.C.) When asked why he went there, he merely said, "They know me around Naples." Lou claimed that territory was unimportant, and stated that he simply moved "wherever the people are." (Ricky, who held Lou in disdain, said he was "not about to go chasing after everyone to make money.") Yet Lou almost always stayed within the York district, venturing a block or two away at most. Even this level of mobility, however, seemed to have yielded him a lower number of patrons than the stationary regulars (although, of course, other factors may account for this difference). Lou mentioned only "a couple" of people as reliable givers, and seemed less attached than the other panhandlers to the community of students who frequented York and Broadway.

89. Anecdotal evidence suggests that selling goods (often of little value), although perhaps less pervasive than panhandling, is a common strategy among the extremely poor for earning money. *See, e.g.*, Fisher, *supra* note 83, at B1 (describing homeless man's practice of retrieving discarded goods, such as "furniture and clothes," to "resell on the street").

90. The two bought roses from a flower stand on the corner of York and Broadway or a florist on nearby Howe Street, paying three or four dollars a dozen for wilted flowers, and half price or more if the roses were in good condition.

91. Sandy had recently concentrated much of his efforts near a nightclub on College Street, several blocks from the York district, and had convinced the owner to allow him inside the nightclub each Sunday night to sell his roses. Sandy routinely earned more than $100 on Sundays.

individuals knew that selling roses was more lucrative than panhandling, most waved off the idea. In a typical comment, Ricky said, "Naw, that's Sandy's thing," sounding more intimidated about being an entrepreneur than fearful that he would intrude on Sandy's business.[92]

C. Gifts and Givers

Much of the media's recent discussion of panhandling focuses on the view of the giver rather than the receiver. A recent *Time Magazine* cover story observes, "[i]t is left to individuals to decide . . . how they are going to confront the inevitable challenge to their daily routines when a beggar crosses their paths."[93] Indeed, even the title of the story reveals its orientation: "Begging: To Give or Not to Give."[94] Looking at the other side of the giver-receiver exchange, this section discusses the handouts received by York district regulars, as well as the regulars' perceptions of and relationships with the givers.

1. The Gifts.—Money was by far the most common gift of passersby, and every regular said that money comprised "nearly all" of the handouts received. Donations averaged between twenty-five and fifty cents (with a dollar being quite common[95]), and ranged from a few cents up to five dollars, with an occasional gift of ten or twenty dollars. Other donations included food and clothing. The medium-income regulars estimated that they received offers of food two to five times a day, generally restaurant leftovers. During dinner hours, Ricky, Terry, and John, whose spots were adjacent to pizza restaurants, often received three or four slices of pizza from pedestrians, enough to constitute a

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92. Another practice, which only Keith relied on, involved collecting returnable bottles and cans—not particularly lucrative in Connecticut, where a bottle or can is redeemable for only five cents. On a "good day," Thursday through Saturday, Keith could earn $10 by rummaging through garbage cans and scanning the York district parking lots. Other regulars considered collecting "returnables" extremely inefficient. James explained: "It'd take me *all night* to find 100 cans, and I'd only get five bucks for that. In that time, I'll make a *lot* more money panhandling."

93. Gibbs, *supra* note 69, at 76. A raging debate exists over whether to give to panhandlers, and the debate is not always divided along ideological lines. *Compare* Platt, *supra* note 67, at A25 (executive director of homeless services center argues that "out-of-pocket donations only aggravate the problems they are meant to relieve" because they help support chemical dependencies and discourage working at the minimum wage) *with* Ed Abrahams, *I Give. I Don't Ask Why They Need the Money*, N.Y. TIMES, Aug. 10, 1988, at A26 (New York director of the Coalition for the Homeless contends that while Platt believes panhandling donations discourage panhandlers from seeking social services, "[m]any panhandlers have already sought these services, only to find them inadequate or unavailable").

94. Gibbs, *supra* note 69, at 68.

95. Perhaps eight to ten times a day for a panhandler in the medium-income group.

filling meal—and generally, far preferred to soup-kitchen food. Perhaps once a week, someone would offer to buy the panhandler a modest meal of their choice; gifts of coffee and hot chocolate were routine in the winter. Offers of clothing, not surprisingly, were most common in the winter months, and generally came from those who knew the panhandler well. Rounding out the donations were cigarettes, the occasional beer, and books and magazines.

2. The Givers.—Although estimates varied, the panhandlers generally thought that ten to twenty percent of the York district pedestrians gave something to them, citing Yale students in particular for their generosity. Several of the regulars estimated that perhaps half of the Yale students gave something, although this estimation is probably somewhat exaggerated. The panhandlers had varying views of the generosity of the townspeople, although most perceived them to be less generous than Yale students, both in the percentage of givers and in the amount of the average gift.[96]

Certain pedestrians were especially notable for their generosity and concern. Eight of the panhandlers (including the rose sellers) mentioned that they benefitted greatly from repeat givers, or "patrons."[97] Patrons ("my associates," Fred called them) knew a particular panhandler by name, regularly talked with him on the street, gave him significant amounts of money (perhaps five dollars a week), and were also far more likely than other passersby to offer the panhandler clothing or food. A patron's commitment could vary from a routine donation of a dollar and a warm greeting to long conversations that ended with gifts of new clothing. The Yale and New Haven police were well aware of these patron-panhandler relationships. One Yale police officer described in detail the various goods and services offered to a panhandler who died before this study began. In her words, "He had all these people trained to help him out."[98]

Patrons seemed more often than not to be Yale students, although they also included other New Haven residents, certain store employees, some bar regulars from surrounding towns, and, interestingly, a number

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96. When asked how they could differentiate between Yale students and other pedestrians, most panhandlers laughed; in one instance, a regular asked if the interviewer was "an idiot."

97. There is evidence that panhandlers in other societies enjoy similar relationships. *See* Gmelch & Gmelch, *supra* note 77, at 448-50 ("After begging in the same [Dublin] neighborhoods for a year or more, some beggars establish patroness-client relationships with certain housewives. . . . In patroness-client begging, . . . [a]t the very least, personal names are used and the most obvious begging strategies . . . are no longer necessary. In the more established relationships . . . [f]riendship and confidences are sometimes shared.").

98. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30.

of police officers.[99] The number and loyalty of a panhandler's patrons appeared to depend on two factors: how long a panhandler had been in the York district,[100] and how actively the panhandler cultivated relationships with pedestrians. Ricky and John, the two most amiable, outgoing panhandlers, each estimated that they had good relationships with more than twenty-five or thirty such patrons, probably the most among the York district regulars.

Not all the panhandlers had patrons. In fact, those who were perhaps most in need of such help received it the least. Building and sustaining long-term relationships with passersby appeared nearly impossible for Chip and Barry, the mentally ill panhandlers, and Linda, the combative drunk. Indeed, all three were more likely to alienate pedestrians than to befriend them.

3. Mistreatment.—On the other end of the spectrum from "patrons" were those pedestrians who ignored or even hassled the panhandlers. By far the most common slight the regulars faced was pedestrians refusing to acknowledge their existence, a reaction that, according to the media, appears to be on the rise.[101] Less common were those who appeared frightened or disgusted by the panhandler. These pedestrians often left a wide berth between themselves and the panhandler. Several of the regulars expressed concern that those panhandlers who were excessively drunk or mentally ill frightened pedestrians into believing that every panhandler "was way lost of control, lost of control," as Ricky put it. "Makes it bad for all of us," he muttered.[102]

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99. *See infra* Part IV.C.

100. One regular, Terry, believed that a patron's giving declined over time. In his view, a patron would only give for a certain period of time, "because they're gonna expect that you get your act together." Terry nevertheless seemed to have a number of patrons. He said: "You know—they [the patrons] look out for you . . . you have an understanding with them . . . you don't even need to ask."

101. *See, e.g.*, Peter Steinfels, *Apathy is Seen Greeting Agony of the Homeless*, N.Y. TIMES, Jan. 20, 1992, at A1 ("A decade after homeless and destitute people began flooding city streets, religious leaders say they fear that Americans are beginning to turn away from the outstretched hands, numbed by the severity of the problem and confused about how to respond."). There is, apparently, an increasing desire among some Americans, particularly in large cities, to have the homeless and extremely poor out of sight and out of mind. *See, e.g.*, Sara Rimer, *Doors Closing as Mood on Homeless Sours*, N.Y. TIMES, Nov. 18, 1989, at A1:

> As New Yorkers become increasingly disturbed and exasperated by the overwhelming presence of homeless people, more and more public institutions are adopting policies intended to keep out the homeless. . . .
>
> [An] official who oversees the outreach program for the homeless in the subway . . . said there had been a marked change . . . in letters from riders . . . . "[T]hey've [recently] been saying: 'Just get them out. I don't care. Just get them out any way you can.'"

102. The lucid regulars themselves attempted, as best they could, to control the

Verbal abuse was uncommon, although all the regulars suffered occasional remarks such as "Get a real job!" or "Get the hell out of here!" from passersby. The relative freedom from verbal harassment seemed to arise from at least two factors. The first was peer pressure, especially within the Yale community,[103] which was generally sympathetic to the panhandlers' perceived plight. At least three panhandlers recalled recent incidents where one student in a group had insulted the panhandler, and others had immediately criticized that student. Second, if a pedestrian (usually drunk) leveled more severe verbal abuse at the panhandler, a Yale or New Haven police officer would, if nearby, generally intercede and protect the panhandler.[104] Such episodes were relatively rare, however.

In sum, the York district regulars generally sought to present themselves as friendly, appreciative, and anything but dangerous, drawing a sharp contrast to the view of panhandlers as aggressive and intimidating.[105] In the York district, at least, if any pedestrians felt harassed by the panhandlers, it was likely due to the rantings and unpredictable behavior of the area's three "loose cannons," Chip, Barry, and Linda, or by transients who might not, for various reasons, adhere to the strategies of the other regulars. Interestingly enough, to alleviate the problems caused by these more threatening players, the lucid regulars themselves attempted to control the activity of panhandling. The next Part, which considers the regulation of panhandling, thus begins with the pattern of control imposed by the panhandlers, and then explores their relationships with York district businesses and the police.

IV. Regulating Panhandling

Panhandling was "regulated" in New Haven, but that regulation was structured less by formal legal rules than by the relationships and informal norms operating among three groups: the panhandlers themselves, business owners and employees, and the police. First, the panhandlers worked to maintain a modicum of order and stability among themselves, minimizing aggressive soliciting and other problems. Second, York district businesses attempted to regulate panhandling further, through modest "self-help" measures, but they also expressed concern *for* the

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panhandlers that they felt intimidated pedestrians. *See infra* notes 108-15 and accompanying text.

103. New Haven Police Sergeant Arthur Alonzo observed, "You wouldn't believe how concerned all these students are about the street people." Interview with Arthur Alonzo (pseudonym), Sergeant, New Haven Police Department, in New Haven (Mar. 16, 1992).

104. *See infra* Part IV.C.

105. *See, e.g.*, William Poole, *Beggars' Army*, N.Y. Mag., Aug. 29, 1988, at 31 (suggesting that aggressive begging has become a panhandler's only way to make money).

panhandlers, and their relationships with the regulars were a complex blend of annoyance and sympathy. Finally, although the New Haven and Yale police forces constituted the ultimate authority for maintaining order in the York district, their control of panhandling did not readily reflect the applicable law, and they seldom arrested panhandlers for criminal violations. Instead, customary understandings with the regular panhandlers, and even friendships with many of them, provided the foundation for police regulation of panhandling. This Part explores the dynamics of the relationships among panhandlers, shopkeepers, and police, to piece together how panhandling in the York district was regulated in practice.

A. Rules Among the Panhandlers

Although it would be an exaggeration to claim that the panhandlers truly "policed" themselves, the lucid regulars did attempt to enforce certain informal rules, or norms, among the panhandlers. These loosely followed norms served to increase panhandling income by ensuring peace and stability on the street, and thus a less hostile environment for pedestrians.[106] Ironically, then, the panhandlers that pedestrians and the media so often perceive as a threat to safety on the street can be a source of order. The norms examined here are closely related to the strategic components of panhandling discussed in Part III, but those strategic components were self-imposed, whereas the norms at issue here were community standards, "rules" the panhandlers sought to enforce on each other (sometimes with limited success).[107] Three norms in par-

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106. For extended analysis of the hypothesis that members of "close-knit" groups will "develop and maintain norms whose content serves to maximize [their] aggregate welfare" in certain circumstances, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167-83 (1991). No attempt is made here to apply this hypothesis rigorously to the York district panhandlers. Ellickson conditions the applicability of his hypothesis on the existence of several specific criteria, many of which may not be satisfied here. For example, the panhandlers may not fulfill the defining requirements of a "close-knit group," *id.* at 177-82, and Ellickson points out that the "informal-control system[s]" he analyzes "may not be effective if the social conditions within a group do not provide members with information about norms and violations and also the power and enforcement opportunities needed to establish norms." *Id.* at 177 (footnote deleted). The panhandlers had little real power over one another, making enforcement of the norms at issue a difficult task. It also may not be appropriate to lump all panhandlers into one "group," but rather, to separate out the lucid regulars as constituting one group that attempted to enforce *its* norms on those—newcomers and drunk or mentally ill regulars—who were not part of that group.

107. *See id.* at 126-32 (distinguishing among five types of rules of behavior including (1) "personal ethics" imposed by an individual upon herself, and (2) "norms" enforced by others, including those "not involved in the primary interaction").

ticular reflected the regulars' intense interest in preserving the favorable panhandling conditions in the York district: (1) respecting pedestrians, (2) maintaining minimum distances between panhandlers, and (3) honoring existing claims to territory.

The most important norm concerned the expectation that every panhandler treat pedestrians respectfully. While the regulars[108] could generally rely on one another to adhere to this strategy out of self-interest,[109] they sought to impose similar conduct on the "problem regulars"—Linda, Barry, and Chip—as well as on newcomers, whose behavior they could not always predict. According to several panhandlers, the core fear was that when one panhandler was aggressive or unpleasant, pedestrians attributed that behavior to "all of us on the street." "[The aggressor] makes us all look like nut cases, which we don't need," observed Fred.[110] Worse yet, this intimidating behavior upset the delicate balance regulars like Sandy, Terry, and Lou believed they had achieved with the police. Terry elaborated: "Too much noise, [the officers] will start moving us along."[111]

The regulars' attempts to control the problem regulars and others were not always successful. When Linda was drunk, she often yelled or growled at those who passed by her, while Chip spent a lot of time talking loudly to himself, dancing around unsteadily, or curled up in minor convulsions. Keith (himself often drunk) routinely tried to keep Linda quiet, and John and Ricky often talked to Chip, asking him to stop harassing passersby. "Always making a fool out of himself," Sandy remarked. Barry was most a concern when he tried to panhandle instead of keeping to himself; he was most frightening, Lou and Ricky complained, when his unsteady speech and actions were aimed directly at passersby.[112]

When transients appeared on the street, the regulars approached them to explain the importance of respecting pedestrians. Ricky strongly

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108. Here, the term "regulars" refers to the nine lucid regulars.

109. On occasion, regulars would caution each other about being disrespectful. Ricky mentioned that on certain evenings, John might drink too much: "Then he start yappin' 'Howyadoin' right in everyone's face, right up next to them. Get some people *mad*, and then I'll catch him for a moment, [and] say 'John, slow up, slow up.'"

110. Newspaper and magazine articles often, it seems, choose to portray only the more aggressive and frightening panhandlers and street people, which may merely reinforce pedestrians' images of their own most unsettling experiences with panhandlers. *See, e.g.*, Painton, *supra* note 78, at 14.

111. The panhandlers' relationships with the police are discussed *infra* Part IV.C.

112. If other panhandlers less familiar to the York district were drunk or appeared to be a "bugs bunny," as Ricky called the mentally ill, one of the regulars would try at least once to calm them down if they were causing a disturbance. James was particularly annoyed with one or two noisy intruders who sometimes floated through the York district after eating at the nearby Community Soup Kitchen on Broadway.

advised the stream of short-term panhandlers to "give everyone your respect." He appealed to their self-interest: "You benefit you, you benefit us," Ricky would say, "because you get yourself some money, and won't go scarin' away everyone who gives us money."[113] James made a point of talking to every person he did not know on Broadway to "keep them in line."[114] The regulars generally stated that the transient panhandlers adhered to the advice they gave them—except when, like the problem regulars, they were heavily affected by drugs or alcohol, or were mentally ill. In fact, the transients sometimes approached the established panhandlers first to ask if there was money to be made ("How is this place?" "How's it flow around here?"), and the regular, after answering, would then add his views on "how it works on this street."[115]

The second loosely enforced norm applied to the distance two panhandlers maintained between them when asking for handouts. The lucid regulars agreed that about twenty-five feet was the minimum reasonable space between two panhandlers, the concern being that if they were any closer together, pedestrians would find them too overbearing.[116] James pointed this out, saying "no one'll give to us if we're on top of each other." The pieces of territory held by Fred, Terry, James, Ricky, and John readily adhered to this twenty-five-foot "rule"; James and Terry

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113. Ricky expressed a sense of common purpose among the panhandlers, stating that he never wanted to see another panhandler doing badly. He saw newcomers less as competitors than as fellow people "who didn't get a break." His view was: "plenty here for everybody." Terry echoed Ricky, indicating that new panhandlers did not concern him nearly as much as new *loud* panhandlers. James and Lou, in contrast, worried that a saturation point might come.

114. Although it was rare, a fight between two panhandlers was a nightmare for the regulars. Fights frightened pedestrians, and usually brought police officers and arrests, straining the relationships the rest of the panhandlers had painstakingly built up with the police. *See infra* Part IV.C. If possible, a regular would try to resolve a dispute before the police appeared. Ricky, for instance, appealed to the combatants' self-interest, warning them that the police would arrest everyone involved, so no one could "win" the argument. Shaking his head, John said, "nobody wins, nobody wins, *we all lose* every time some idiot start it up." James agreed, asking "What's the logic? What's the logic?"

115. Regulars sometimes advised transients to stay away from certain businesses, knowing it would cause a problem if the panhandler stood there. Cutler's Records on Broadway, in particular, was forbidden territory. The owner "*hated*" panhandlers, Keith and Lou both said.

116. The 25-foot rule seemed not to hold on warm evenings when overflows from Demery's and Toad's Place brought large numbers of people onto the street. One store owner recalled counting six panhandlers within about 50 feet of one another outside of Toad's Place one evening. Interview with Chuck Caldwell, Owner, The Game, *supra* note 74. The rule's lack of application in such circumstances probably did little harm, because the policy behind it—not overwhelming pedestrians—was not furthered, given that the large number of pedestrians likely diluted the effects of so many panhandlers.

were the closest regular territory-holders, with perhaps seventy-five feet between them. Newcomers and the problem regulars did not always abide by the rule, but if one of them stood too near to an established panhandler, the latter would ask the intruder to move away. James, for instance, would say, "Hey! A little respect, my man?" The newcomer often heeded James's request, but if he proved unwilling, James would move over himself, or leave. He did not want even the most remote possibility of a fight.[117] Lou, in contrast to the other medium-income group members, claimed that he was not as concerned about distance, but the author never saw Lou sitting near another panhandler.

The final norm involved recognition of territory. Compared to "distance violations," the regulars were far more annoyed if they found a problem regular or a transient sitting in their spot. Such "trespassing," which probably did not affect the York district environment as much as breaches of the other norms, nevertheless bothered Fred, Ricky, John, Terry, and James (those with spots) significantly. Not only did a trespasser disrupt their sense of routine, but having to panhandle *near*, rather than *in*, their spots often proved exceedingly difficult because most businesses adjacent to particular spots disliked having a panhandler within the actual boundary lines of the storefront.[118]

When a regular found his spot occupied, he had a number of options. Upon a request to move, transients often surrendered the territory; those who stayed on the block for several days, explained Ricky, would often, after the first day, move away before he even approached them. Sometimes, the trespasser asked for a brief grace period to earn some money, tacitly accepting the established panhandler's claim to the area. When the trespasser was recalcitrant, however, the "owner" occasionally enlisted the help of another regular. James, Terry, Ricky, John, and even Keith and Sandy, who did not themselves depend upon territory, had at one time or another intervened on behalf of another regular, telling a stranger to "show a little respect, and move on out," as Ricky put it. More commonly, though, if the trespasser proved hostile, the regular would move aside for the time being.

Ironically, the norms or "regulations" that prevailed among the lucid panhandlers approximated in certain ways the "model begging statute" set out in a recent Note.[119] That proposed statute would prohibit panhandling that is "accompanied by harassment" and would limit "in-

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117. Other regulars, too, said that they would restation themselves elsewhere or stop panhandling rather than risk an argument, but they always asked the other person to move first, indicating a sense of entitlement to their territory.

118. *See infra* notes 130-33 and accompanying text.

119. *See* Knapp, *supra* note 8, at 423.

trusions of privacy upon a captive audience."[120] Given that panhandling of this sort was likely to reduce their income, most of the York district regulars already adhered to such regulations, and sought to impose them on other panhandlers in the area. Nevertheless, in the eyes of the district's businesses, panhandling still presented a problem. The next section explores the attempts by these businesses to control panhandling.

B. Panhandlers and the York District Businesses

The businesses in the York district were interested in protecting their own profits—profits, some business owners believed, that were adversely affected by panhandling's prevalence in the York district. For these owners, the desired regulation of panhandling was simple: prohibit it. However, not only was panhandling legal in Connecticut, but the police had made clear to many businesses their belief that the panhandling problem could not be solved simply by enforcing existing laws or enacting new ones. This left store owners and restaurateurs to rely on modest self-help measures to reduce the perceived negative effect that panhandling had on their businesses, with a rare call to the police when a panhandler posed a peculiarly difficult problem. But businesses' relationships with panhandlers were far from uniformly negative. The sense that many of the panhandlers were decent human beings genuinely in need—a sense enhanced by the regulars' attempts to be polite and respectful toward owners and employees—led the businesses to help the panhandlers as much as they hindered them.

1. Owners: "If It's Your Business, You Worry."—York district business owners could be divided into two categories: "owner-operators," who worked on the premises of their business, and "absentee owners," who relied on employees to run the business day to day. Employees who worked for absentee owners, and were usually paid a fixed wage, were less concerned about panhandlers than owner-operators.[121] If panhandlers did in fact deter potential customers from shopping in the York district, it was the owner-operator or the absentee owner who suffered, not the employee.[122] The owners of Yorkside Pizza, Demery's bar, and the Quality Wine Shop, each of whom ran their business on-site, all described panhandling in the same, simple way: "It's bad for business."[123]

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120. *Id.*

121. Among the more prominent owner-operated businesses were Yorkside Pizza, Toad's Place, Demery's, Quality Wine Shop, and Broadway Pizza.

122. Although, of course, an employee might lose her job if the business closed or reduced its hours or workforce. The employees interviewed did not seem to consider this a realistic possibility, and their views of the panhandlers were largely positive. *See infra* notes 141-44 and accompanying text.

123. Interview with Tony Koutroumanis, Owner, Yorkside Pizza, in New Haven

Contrasting himself to a flat wage employee, the Yorkside owner added, "If it's *your* business, *you* worry."

Owner-operators feared they were losing customers of two sorts: those from nearby towns without bookstores, wine shops, and similar businesses of the caliber offered by the York district, and visitors to the Yale campus, looking for a souvenir or a meal. Neither type of customer, the owner-operators explained, realized that most of the regular panhandlers were not dangerous. These customers were the ones who usually complained to the businesses about being "approached, harassed, attacked, jumped," and so on, by panhandlers.[124] The owner of the Quality Wine Shop remarked: "A lot of people [who come to the York district] don't know that they're harmless—you just have to get to know them." Yale students, the owner-operators agreed, continued to patronize the York district despite the panhandling,[125] although the owners were distressed about the students' generosity toward the panhandlers: "they're

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(Apr. 1, 1992); Interview with Raymond Pitkin (pseudonym), Owner, Demery's, in New Haven (Apr. 1, 1992); Interview with Thomas Stimson (pseudonym), Owner, Quality Wine Shop, in New Haven (Apr. 2, 1992). The owner-operator of The Game, a clothing store, stated that his profits were down over 20% since 1989, the year that both businesses and police generally dated as marking a significant increase in York district panhandling. Interview with Chuck Caldwell, Owner, the Game, *supra* note 74. (In the mid-1980s, apparently only two or three regulars and a few transients panhandled in the district.) The late 1980s also marked the beginning of a recession, leaving in doubt the comparative negative effects of panhandling, the recession, and other unidentified factors. Some owner-operators readily acknowledged that much of their profit drops could probably be attributed to the recession. Interview with Raymond Pitkin, Owner, Demery's, *supra*.

The owner-operators based their belief that panhandling harmed business on anecdotal evidence. The owner of The Game stated that on occasion, when a panhandler stood directly in front of his store, the number of customers would drop immediately. Interview with Chuck Caldwell, Owner, The Game, *supra* note 74. There were conflicting views from some employees and police, however. For example, one employee at Ashley's ice cream, two doors down from The Game on York, stated that the presence of panhandlers, even in the store, did not affect business. Interview with Michele Rosen (pseudonym), Employee, Ashley's, in New Haven (Apr. 2, 1992). Further, one New Haven police officer believed that the York district businesses were suffering largely because of the recession, and were using the panhandlers as scapegoats. Of the claim that panhandlers accounted for significant losses in business, the officer said: "It's not true. It's unfortunate [that the business owners think that way]." Interview with Ron Oates, Sergeant, New Haven Police Department, *supra* note 30.

Other metropolitan areas do have systematic evidence that panhandling may deter customers from shopping in a given area. In an April 1991 public opinion poll conducted by the San Francisco City Attorney's Office, 25% of Bay Area residents polled said that they shopped in San Francisco "less often" because they were "turned off by panhandlers." *See* James N. Baker, *Don't Sleep in the Subway*, NEWSWEEK, June 24, 1991, at 26.

124. Interview with Raymond Pitkin, Owner, Demery's, *supra* note 123.

125. Of course, this could be due as much to the relative lack of other businesses catering to student needs in the area as to any other factor.

the ones who give all the money and keep the beggars coming back for more."[126]

Given their impression that panhandling reduced business profits, owner-operators wanted the police to drive panhandlers out of the York district. But panhandling was not illegal in Connecticut, and the New Haven and Yale police forces rarely enforced those criminal provisions that might apply to panhandling.[127] Worse still for the owners, the New Haven police had made it clear in several meetings with York district business leaders that a formal ordinance restricting panhandling would not prevent the activity: the police did not have the resources to enforce such an ordinance, nor would they especially *want* to enforce it.[128] Presented with this reality, the owner-operators generally adopted a two-tiered strategy to control panhandling.

The first tier, which constituted the large majority of the owner-operators' efforts at control, involved self-help, meaning "a [person's] efforts to administer sanctions in his own behalf."[129] The basic control mechanism the owner-operators used was simple, and usually effective: confront a panhandler standing in front of or near the owner's store and request—or demand—that he leave. Because the lucid regulars generally knew with considerable precision which businesses actively discouraged panhandling,[130] they posed owners less of a problem than did transients or the mentally ill or drunk regulars. The lucid regulars who held territory generally were a measured distance from any owner-operator's business; further, if those regulars who depended less on territory, such as Lou, Keith, or Dave (who sold roses) began panhandling too near an owner's store (they rarely panhandled directly in front of one), they quickly moved when confronted by an employee or the owner. The Yorkside Pizza owner observed that "the usual ones aren't as much

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126. Interview with Thomas Stimson, Owner, Quality Wine Shop, *supra* note 123. Stimson discussed at length what he perceived as the panhandlers' strategy of soliciting Yale students in particular: "Trust me when I tell you, these guys know that [Yale students] give. I'm absolutely positive about that. That's where they get their money." On panhandling in general, he concluded: "to [the regulars], it's a job."

127. *See infra* Part IV.C.

128. *See id.*

129. ELLICKSON, supra note 106, at 131 n.21.

130. Terry, for instance, rattled off in succession an exhaustive list of businesses, indicating exactly where on Broadway's north side a panhandler could not sit: "Cutler's, Co-Op, Boola-Boola, Campus Clothing, Cobdens, Educated Burger, the stationery store. . ." and so forth. Fred, too, showed me just where his panhandling "rights" ended—at the fringe of the shoe store connected to J. Press clothing. The regulars' perception of owners' self-help measures matched the owners' descriptions. In the forbidden areas, the regulars said, a panhandler could expect someone to come out relatively quickly and order him to move. For those regulars with "spots," this knowledge was only necessary when they found their territory occupied.

of a problem. They're *predictable.* You ask them to go and they move over, they go."[131] Of greater concern were the problem regulars and new panhandlers, who often stood in front of owner-operated businesses, and were not predictable.[132] "It's nerve-racking," said one owner. "You don't know what the new ones will do [to passersby], or what they'll do when you tell them to move." Although lucid newcomers generally did leave, Barry and Chip, and other drunk, drugged, or mentally ill panhandlers did not always honor such requests. Moreover, the owners often observed a "creep" phenomenon—the panhandler would move away, then creep back to where he had been standing. This usually brought a more vociferous demand to leave from the owner.[133]

As the second tier of control, owners sought police assistance, but only when a panhandler was behaving violently or proving *extremely* bothersome. The Quality Wine Shop owner observed that it was otherwise "a waste of police time," because in all other situations, the officer at most simply asked the panhandler to leave. Generally, the owner of The Game noted, "It doesn't do any good" to call the police. "The problem is so overwhelming that they don't even try to deal with it." One owner had called the Yale police after finding Chip dancing in circles outside of the store, howling and spitting pizza out of his mouth. Similarly, an employee from Store 24 (which had an absentee owner) had called the New Haven police when two transients began fighting over who could panhandle near the store's entrance.[134]

When owners came in routine contact with the police (for example, when officers bought slices of pizza at Yorkside), the owner might express general annoyance about the panhandling situation; these comments appeared similar to everyday complaints about bad weather. In short, owner-operated businesses found police assistance a last resort, helpful in situations where a panhandler's behavior was considerably more disruptive than the routine behavior that characterized the regulars;

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131. Interview with Tony Koutroumanis, Owner, Yorkside Pizza, *supra* note 123.

132. Interestingly enough, then, the owner-operators shared the regulars' concern about the appearance of newcomers and problem regulars for the same reason: for both panhandler and owner, these other panhandlers posed potential threats to pedestrians, increasing the possibility that less pedestrians would come to the York district—and revenues for both business owner and regular panhandler would suffer.

133. Threats to call the police usually proved a more effective deterrent, but because the owners could only rely on the police providing much assistance when a panhandler caused extraordinary trouble, such threats were generally reserved for cases where the owner believed the police would, in fact, forcibly move or arrest the panhandler.

134. Both were arrested, according to the employee. It is probably not a coincidence that James, who usually panhandles in the spot at issue, did not recall the incident. He was likely not there that day; had he been, the two panhandlers might never have had the opportunity to fight over the spot.

otherwise, the owners faced the problem alone as best they could.

2. "I Was Always for the Little Guy": Charity for Regulars.—The York district businesses did not always turn a cold shoulder to the panhandlers. In fact, interviews with owners consistently revealed sympathy for the regulars, whom they had come to know over time. Further, employees who worked for absentee owners generally had none of the negative feelings harbored by owner-operators; such employees even become friends with certain regulars. This section considers the more receptive attitudes expressed by district businesses, and the benefits that these businesses provided to the panhandlers.

The businesses' sympathy for the panhandlers seemed to derive from two factors. First (and of particular note for the owner-operators), the businesses over time had recognized that the lucid regulars caused little difficulty on the street. The worst they were guilty of, most owners and employees agreed, was offending those customers who were annoyed by any kind of panhandling, no matter how unaggressive. Owners may still not have cared for panhandling, but the regulars proved more or less responsive to their requests to move, and, as noted above, their behavior was predictable. Second, both owners and employees often believed the regulars were simply victims of a poor economy, bad luck, and so on. "A lot of them," one owner said, "would really like a job. But you're not going to find work too often today."[135] "I was always for the little guy," another added; "I know it's hard." Familiarity with a panhandler tended to increase this sympathy. Owners and employees often talked with regulars who came in to make a purchase. With the exception of Lou, who appeared to have alienated many businesses, the lucid panhandlers said that they tried to be especially polite during these exchanges. An owner on Broadway stated, "We don't dislike them as individuals. [John's] a likable guy; [Fred's] fine."[136] The owner of Toad's Place added, "I don't mind the decent ones, the nice [regulars]. I have no problem with them."[137]

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135. Another owner added that several regulars would ask now and then if he had a job available. He continued: "They know I'm going to say no—and I don't [have jobs available]—so then they ask me for money." Interview with Chuck Caldwell, Owner, The Game, *supra* note 74.

136. In contrast, certain owners distinguished between "hustlers" and panhandlers "who really deserve" help. These owners believed that work was available for most of the panhandlers: "all [they] got to do is put half the energy into finding a job that [they] do pestering my customers." Interview with Raymond Pitkin, Owner, Demery's, *supra* note 123. Pitkin had special contempt for John, the "Howyadoin" regular. He knew that John had an apartment, and he flatly stated that "John clears [a] *hundred bucks* near my business every night. No taxes. No responsibility. That's crap." The owner may have overstated John's earnings. *See supra* note 83.

137. Interview with Michael Spoerndle, Owner, Toad's Place, in New Haven (Apr. 2, 1992).

The sympathies of both owners and employees often translated into modest donations, usually food. The businesses gave only on an individual basis, and secretly, so as not to encourage other panhandlers to ask for handouts. In turn, the regulars jealously guarded these benefits. Some restaurants gave meals away, off and on, to a particular regular.[138] James, for instance, might order lunch at Demery's, intending to pay, and the cashier would wink and say, "this one's on the house." Similarly, Toad's Place occasionally admitted Ricky without charge on early Saturday evenings,[139] when the bar offered free pizza; the WaWa convenience store spared a hot dog for Fred now and then. In addition, a number of stores provided the valuable service of making change for the panhandlers, usually exchanging a ten-dollar bill for an unwieldy equivalent in small change.[140] Some panhandlers performed token chores to enhance their relationship with a particular business; such chores generally resulted in a cup of coffee or a dollar. The Quality Wine Shop owner noted, "I don't mind having Terry around sometimes because we have a dog that sits outside here if it's not cold. Terry watches the dog." Similarly, James took out trash for Store 24 every so often.

The regulars' closer relationships with employees at non-owner-operated businesses bears additional mention. Because these employees usually did not hold the ambivalent attitude of the owners, they established closer ties to the panhandlers.[141] Their more lenient stand on panhandling usually meant that transients ended up panhandling closer to their businesses; and at least one regular's spot (James's), adjacent to Store 24, probably would have been "closed down" had the Store 24 owner worked on the premises.[142] Not only did several employees

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138. Davenport, one of Yale's residential colleges, also offered under-the-table donations, sometimes providing free dinners to a few panhandlers outside of its kitchen, which had a service entrance on York. Lou, Ricky, John, and Fred enjoyed this privilege, and were careful not to eat these meals in front of others.

139. Ricky later reported that the doormen at Toad's Place no longer allowed him in. He was extremely distraught over this reversal, and had no explanation for it.

140. Because he routinely provided this service for Terry, the Quality Wine Shop owner was able to corroborate Terry's estimate that he made between $40 and $50 each day he panhandled. Interview with Thomas Stimson, Owner, Quality Wine Shop, *supra* note 123.

141. In contrast to owner-operators, employees in absentee-owner businesses generally did not believe that the panhandlers were responsible for any decline in business in the York district. Interview with Michele Rosen, Employee, Ashley's, *supra* note 123; Interview with Jane Simon (pseudonym), Employee, Educated Burger, in New Haven (Mar. 30, 1992).

142. Similarly, although the owner of WaWa's had hired a security guard to maintain order in and around the store (which was a magnet for late night trouble), the guard allowed Fred to sit next to the store; had the owner worked there, it is doubtful that Fred would have enjoyed this privilege.

say that they enjoyed the company of certain of the regulars, but some indicated that particular regulars "looked out for them" in various ways, such as by accompanying them to their car if they finished work late at night.[143] The regulars who were closest to such employees understood that the employees earned only a modest income.[144] These regulars might accept a cup of coffee from an employee, but they considered it a matter of courtesy not to ask for handouts from them. In fact, James had once mistakenly solicited an employee he knew well; when he recognized her, he quickly apologized.

C. Panhandlers and Police

New Haven and Yale police served as the primary authority for maintaining order in the York district, working both to prevent panhandlers from becoming too aggressive toward pedestrians *and* to ensure the panhandlers' safety. The formal criminal provisions potentially applicable to the panhandling problems that arose in the York district did not constitute a central component of the officers' approach to regulating panhandling. Indeed, while Connecticut has no statute specifically prohibiting panhandling, the officers indicated that such a prohibition would not fundamentally alter their regulation strategy. The police considered panhandling at least as much a social and economic problem as a legal one, and, generally finding the blunt use of arrest neither effective nor desirable, they regulated panhandling largely by relying on their relationships with the panhandlers and on customary practices of control, not always in accord with the relevant legal rules. "We're not using law to deal with [panhandling]," said New Haven Sergeant Arthur Alonzo.[145]

1. A Law on the Books, not the Streets.—Reference to the General Statutes of Connecticut or the Code of the City of New Haven would not inform a lawyer much about actual police regulation of panhandling in the York district. Certain laws on the books were not often enforced, while at times, other "laws" that did not exist *were* enforced. New Haven and Yale police officers rarely arrested[146] panhandlers under the

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143. Interview with Samantha Parks (pseudonym), Employee, WaWa's, in New Haven (Mar. 31, 1992).

144. It can safely be said that those employees who worked at the minimum wage often made less in one day than the middle-income group regulars. *See supra* text accompanying note 67.

145. Interview with Arthur Alonzo, Sergeant, New Haven Police Department, *supra* note 103.

146. "[A]rrest may easily misrepresent the reality of routine police work." DONALD BLACK, THE MANNERS AND CUSTOMS OF THE POLICE 86 (1980). Black continues:

Connecticut statutory provisions against disorderly conduct[147] or breach of the peace.[148] This may not seem surprising, because many regulars were generally polite and respectful in their soliciting, and, given that neither Connecticut nor New Haven prohibits the mere activity of panhandling[149] or loitering,[150] the regulars apparently were not violating any legal provision.[151] But the police generally did not arrest even those

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> Too often the [police] routine is equated with the exercise of the arrest power, not only by members of the general public but also by lawyers and even many police officers. In fact, however, the daily round of the patrol officer . . . infrequently involves arrest . . . . The most cursory observation of patrol officers on the job overturns the imagery of people who make their living parceling citizens into jail.

Id. (footnote omitted).

147. CONN. GEN. STAT. ANN. § 53a-182 (West 1991). That section provides:

> (a) A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) Engages in fighting or in violent, tumultuous or threatening behavior; or (2) by offensive or disorderly conduct, annoys or interferes with another person; or (3) makes unreasonable noise; or (4) without lawful authority, disturbs any lawful assembly or meeting of persons; or (5) obstructs vehicular or pedestrian traffic; or (6) congregates with other persons in a public place and refuses to comply with a reasonable official request or order to disperse.

148. CONN. GEN. STAT. ANN. § 53a-181 (West 1991). That section provides:

> (a) A person is guilty of breach of the peace when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or his property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public, hazardous or physically offensive condition by any act which he is not licensed or privileged to do.

149. Connecticut repealed an anti-panhandling statute in 1969. Former § 53-340, entitled "Vagrants and common drunkards," provided in part: "[A]ll beggars who go from door to door or beg in the highways . . . shall . . . be imprisoned." CONN. GEN. STAT. ANN. § 53-340 (repealed 1969). Former § 53-336, entitled "Tramps," provided in part: "All transient persons who rove about from place to place begging . . . shall be deemed tramps, and every tramp shall be punished by imprisonment for not more than one year." CONN. GEN. STAT. ANN. § 53-336 (repealed 1969).

150. Connecticut provides by statute that each municipality has the power to "[k]eep streets, sidewalks and public places free from undue noise and nuisances, and prohibit loitering thereon." CONN. GEN. STAT. ANN. § 7-148 (West 1991). However, New Haven has no anti-loitering ordinance. *See* NEW HAVEN, CONN., CODE OF GENERAL ORDINANCES (1991).

151. No Connecticut court has directly addressed the question of whether aggressive panhandling may constitute either disorderly conduct, CONN. GEN. STAT. ANN. § 53a-182, or breach of the peace, CONN. GEN. STAT. ANN. § 53a-181. Mere requests for money from passersby do not violate either provision. The Connecticut Supreme Court has held

individuals whose panhandling activity arguably *did* violate the disorderly conduct or breach of the peace provisions; instead, the officers attempted merely to get the troublemakers to leave.[152] On the other hand, the police often ordered new panhandlers to leave the York district for violating a non-existent anti-panhandling "law."[153] Even the regulars suffered predictable, episodic enforcement of this anti-panhandling "law," with orders to stop panhandling, and even threats of arrest or (rarely) actual arrest, when they were not committing any crime.[154] This section seeks in part to explain these discrepant phenomena.

Police regulation of panhandling was largely determined by two sets of factors: (1) constraints on the legal system and the law's perceived ineffectiveness in solving the problem of panhandling; and (2) officers' ongoing relationships with the panhandlers.

The first set of factors begins with constraints on the resources of the criminal justice system. Even in its more harassing forms, panhandling was, as New Haven Sergeant Arthur Alonzo put it, "a minor problem, and we really don't have the time or resources to deal with panhandling complaints much. We've got murders, armed robberies, and drug dealing to face here."[155] Alonzo's views reflected those of his colleagues on both the New Haven and Yale police forces.[156] Echoing the police, prosecutors

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that speech alone can only constitute disorderly conduct if it amounts to "fighting words," *see* State v. Anonymous, 389 A.2d 1270, 1272 (Conn. 1978), and the court has implied a similar limitation for breach of the peace charges, *see* State v. Battista, 523 A.2d 944, 945 (Conn. 1987). Further, mere persistence in requests for money probably would not violate the disorderly conduct provision. *See* State v. Anonymous, 363 A.2d 772, 774 (Conn. 1976) (defendant, attempting to sell newspaper to complainant, "persisted after [complainant] had expressed disinterest in his cause. That, however, without more, does not constitute criminal conduct.").

152. Thus, panhandlers who directed sharp streaks of violent profanity at pedestrians, or followed them, touching them and asking for money, were in many instances coaxed, ordered, or escorted away from the area, rather than arrested. *Cf., e.g., Battista*, 523 A.2d at 945 (breach of peace conviction for repeatedly cursing complainant in loud voice in public place). This is not to say that arrests never occurred. *See infra* notes 195-205 and accompanying text.

153. There did not appear to be a clear legal basis for a police order to stop panhandling and leave the area when a panhandler was merely asking passersby for money. As stated, New Haven does not have a loitering ordinance, neither New Haven in particular nor Connecticut in general prohibits panhandling, and the statutory provisions relating to disorderly conduct and breach of the peace apparently do not apply to the activity of merely requesting money from passersby.

154. *See infra* notes 176-77 and accompanying text.

155. New Haven appears typical in this regard. *See* Gibbs, *supra* note 69, at 74 ("[I]n most cities the police are too busy to spend their time and manpower hustling panhandlers out of sight.").

156. "Prosecutors want to cut your legs off when you bring panhandlers in," warned one Yale officer. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30.

at the Office of the State's Attorney said that they simply did not have the capacity to try aggressive panhandlers for disorderly conduct or breach of the peace violations. Prosecutor Robert Stillman advised: "You've got to allocate your resources wisely. The police don't arrest [panhandlers] and we don't prosecute [them]."[157]

In addition, the police generally believed that arresting panhandlers would not "solve the problem" of panhandling, aggressive or not. Taking a broad view of panhandling as a social and economic problem, rather than as a narrow question of law enforcement, New Haven and Yale officers pointed out that arrests for disorderly conduct and breach of the peace did not address the root causes of panhandling. The officers believed that unemployment and lack of job training, dependency on drugs and alcohol, and deinstitutionalization of the mentally ill accounted for the panhandling in the York district, and several officers stated that arresting a panhandler usually amounted to "taking someone in 'cause they're penniless or drunk, and that's just inhumane."[158] "We are not going to abolish panhandling," Sergeant Alonzo declared, "by locking people up."

Moreover, the officers explained that the applicable legal provisions were not a significant deterrent, even to aggressive individuals, because the sanction was small: arrest followed by a decision not to prosecute. "The worst they'll get," Sergeant Alonzo observed, "is a night in jail and a hamburger while they're in there." Exaggerating only slightly, New Haven Sergeant Oates added, "It's pointless to go arresting these people. They're right back on the street in ten minutes."[159]

The police officers' belief that arresting panhandlers was both an unconstructive and ineffective measure led to their uniform contention that a city ordinance restricting panhandling would change little if an-

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157. Interview with Robert Stillman (pseudonym), Prosecutor, Office of the State's Attorney, in New Haven (Feb. 28, 1992). Stillman pointed out that violations of both disorderly conduct, CONN. GEN. STAT. ANN. § 53a-182, and breach of the peace, CONN. GEN. STAT. ANN. § 53a-181, had to be tried to a six-person jury, with both parties having the opportunity for individual voir dire. This requirement, coupled with the "overload" of "far more serious violations and things to worry about," rendered nonexistent the prosecution of panhandlers under either provision.

158. Interview with Ron Oates, Sergeant, New Haven Police Department, *supra* note 30. Oates's comment reflects the general trend against status crimes. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-340 (repealed 1969) (authorizing prison sentences of up to 360 days for being a "common drunkard").

159. Oates seems to have underestimated the effect of arrest. The regulars indicated that they intensely disliked being arrested, and their fear of arrest repeatedly surfaced in their discussions about their relationships with the police. Moreover, the power of arrest *did* play a role in the officers' actual regulation of panhandling. *See infra* notes 195-205 and accompanying text.

ything on the street. "So what are we going to do?" asked Sergeant Alonzo hypothetically. "Take in every single person who opens their mouth and asks for a dime? No. [Under a new ordinance] we would do pretty much the same thing—get the troublemakers out of there, let the others do their thing, and arrest the guy who really causes a racket."[160] The other officers echoed Alonzo's sentiments, wondering where the resources for enforcing such an ordinance would come from, and questioning the effectiveness of "one arrest after another" as a solution to "guys like [Ricky] and [John] trying to get themselves dinner."[161] But resources and effectiveness were not the only matters at issue here: the officers also disliked the idea of an anti-panhandling ordinance because many of them cared a great deal about the regulars.

Indeed, a second set of factors—the ongoing relationships between the police and the panhandlers—strengthened the police decision generally not to rely on formal law enforcement, and also significantly shaped the way the police ultimately chose to regulate panhandling. Although the officers occasionally prevented panhandlers from engaging in apparently lawful conduct, they also showed great concern for the panhandlers. Given the propensity of recent law review articles on panhandling to focus on the criminal justice system as an organ of oppression directed against those asking for handouts on the street,[162] it would be difficult to overemphasize the general warmth and concern expressed by both New Haven and Yale police officers for the York district regulars. One Yale lieutenant remarked: "Of course we know them! We know who's drunk, who just got [his General Assistance] check, who's in trouble. We build relationships with these people. We share their life. They share ours."[163] In turn, a New Haven sergeant said: "Most of them are not lawbreakers per se. They are humble, modest, polite, well-behaved. They're not involved in crime, usually not in drugs. They're friendly, they're really sincere. A credit to the way they conduct themselves."[164]

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160. Second interview with Arthur Alonzo, Sergeant, New Haven Police Department, in New Haven (Apr. 7, 1992).

161. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30.

162. *See, e.g.*, Hershkoff & Cohen, *supra* note 8, at 896 ("In the fall of 1989, Sharon Gilmore, a poor woman with serious medical problems, repeatedly faced arrest by New York City police. Her crime was telling passersby that she was hungry and asking them for money with which to buy food.").

163. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30.

164. Interview with Ron Oates, Sergeant, New Haven Police Department, *supra* note 30. The jaded reader might conclude that the police were masking their real actions behind these words, but that possibility is unlikely. Not only were the officers genuinely and consistently enthusiastic about discussing this issue with the author, but the panhandlers

Finally, listen to James, one regular panhandler: "Officer [Davis], he *really* looks out for us. He's *really* nice. Gets cold, he buys us coffee, hot chocolate, maybe a candy bar. Makes sure no one hassles us. Sure, he keeps [the panhandlers] in line, but it ain't no big issue." Not every exchange between police officer and panhandler manifested this mutual respect and cooperation. Both panhandlers and officers varied in their assessments of one another. Encounters between officers and panhandlers unfamiliar with one another were less amicable, and the cause of several troubling issues discussed below. But the general relationship between the two groups was far from one of enmity.[165]

From the two sets of factors identified, the actual police practice of regulating panhandling in the York district emerges. The next section attempts to coax the messy reality of that practice into an intelligible pattern. First, however, one of the limits of this part of the study needs to be addressed. Research on police practice was largely limited to interviews with higher-ranking officers who spent more time managing beat officers than policing the street. Some information was obtained informally from beat officers of both police forces, but formal interviews were impossible because each force wished to "speak with one voice," according to Sergeant Alonzo of the New Haven police (Yale's policy was similar). For example, the information on the significant differences between the behavior of new and veteran beat officers described below (and about which the interviewed officers were not particularly clear) derives almost entirely from interviews with the panhandlers. A more thorough understanding of police regulation of panhandling would include in-depth interviews with beat officers.

2. Actual Police Practice.—Police regulation of panhandling consisted of a three-part system of control (categorized by the character of the "encounter"[166] between panhandler and officer) with only the third part involving traditional law enforcement. Each part of this system was powerfully affected by the existing relationship, if any, between officer and panhandler. The first part, here termed "routine encounters," constituted the large majority of interaction between regular panhandlers

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themselves (as well as some store owners) shared similar views of the panhandler-police relationship.

165. This description provided by police and panhandlers in the York district contrasts with the facts in several of the modern cases challenging the constitutionality of statutes restricting or prohibiting panhandling, which generally involve multiple arrests or police harassment. *See, e.g.*, Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (plaintiff arrested five times in eight months for violating statute prohibiting panhandling).

166. The term "encounter" here means any type of interaction between panhandler and officer that held the possibility of mutual conveyance of information. Eye contact constitutes an encounter; a panhandler seeing a police patrol car drive by, with no assurance that the officers riding in it notice him, does not.

and veteran beat officers.[167] Many routine encounters were friendly, and even included donations to the panhandlers. The tenor of routine encounters differed significantly when officer and panhandler were unfamiliar with each other, however, and not uncommonly resulted in police orders to stop panhandling—apparently without a legal basis.[168] The second part, "exit assistance," involved encouraging the panhandler to leave the district when the officer believed it was in the panhandler's interest to go. "Exit assistance" encompassed perhaps one in ten encounters (possibly far less). The third part, "arrests," probably accounted for considerably less than one percent of all encounters. With rare exception, arrests involved encounters between panhandlers and officers who did not know each other well. The following sections consider the contours of each part of this system of regulation,[169] with particular attention paid to the way the relationships between panhandlers and police helped to structure the system.

a. Routine Encounters

Routine encounters were the most common type of contact between police and panhandlers, and were deeply influenced by relationships between regulars and the New Haven and Yale beat officers who patrolled the York district.[170] In most instances, the beat officers did not interfere with the regulars when they panhandled, even when the officers received pedestrian complaints.[171] In fact, many regulars said that at least several

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167. The police did not describe their regulation of panhandling according to this tripartite scheme, making it difficult to estimate the percentage of police-panhandler encounters that fell into the three categories. As a rough estimate, routine encounters constituted about 90% of the encounters; exits, perhaps 10%; and arrests, less than 1%.

168. *See supra* note 153.

169. The police did not use either the term "routine encounter" or the term "exit assistance."

170. Both New Haven and Yale officers patrolled the York district 24 hours every day. *See supra* text accompanying notes 62-63. The panhandlers had a uniform perception of the police as "always being around somewhere or another." They estimated that they saw (but did not necessarily "encounter," as that term is used in this Article) a Yale or New Haven officer in a patrol car several times each hour, and on foot once each hour or so.

171. This was especially so if those complaints amounted to vague charges, for example, of being "threatened" for money. In these instances, the officers generally gave the benefit of the doubt to the regular panhandler. Not only were the officers disinclined to arrest the panhandler on such a routine complaint, for reasons already mentioned, but the officers knew from past experience that it was highly unlikely that the regular at whom the complaint was targeted had done anything more than politely, or at worst assertively, asked for a handout. (The police also generally knew, after even cursory descriptions, if the complainant was referring to a particular regular. For instance, "a

times a week, they could expect a donation—usually food rather than money—from the officer(s) they knew best. Beat officers numbered among the most valued "patrons" of several regulars.[172] On some occasions, officers would ask a regular to "move on for a little while" (Terry's words), although this did not appear to be the norm. The reason for these occasional requests remains unclear, although it is possible that some officers meant, for any number of reasons, to emphasize the power imbalance in their relationships with the panhandlers.

The regulars did not take the officers' non-interference and charity for granted. In fact, *most of the regulars believed that panhandling was illegal*,[173] and that the police had the legal authority to arrest them for the mere act of panhandling. The regulars (excluding Barry, Chip, and Linda) therefore put tremendous emphasis on meeting and staying on good terms with the officers, showing them respect, and, as Ricky said, continually demonstrating that "we don't cause any trouble here, [we're] just getting by." For instance, James greeted every officer he knew by name, and asked them how their day was going. John, in turn, understood that a certain New Haven officer did not like to see him hold out a cup, and he ritualistically withdrew it from sight each time the officer passed.[174]

The regulars' belief that panhandling was illegal apparently derived from the difficulties they experienced when new officers took the York district beat, at least partially disrupting the equilibrium the regulars had built up over time with other officers.[175] New beat officers, the

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big black guy with a round face and a beard near Store 24" meant James. Knowledge of all the regulars' typical behavior was a further guide as to whether the police should investigate a complaint. Interview with David Marcus (pseudonym), Lieutenant, Yale University Police, in New Haven (Mar. 26, 1992)).

172. This was particularly so when the officers were off duty. James recalled receiving $10 or an entire pizza at a time from one officer. John observed that officers bought him hot chocolate or coffee in the winter while on duty, but he, too, agreed that they were most generous when not on the job.

173. All nine lucid regulars believed that panhandling was prohibited by law. This finding is in accord with a considerable body of sociological research discussed by Robert Ellickson: "[M]ost people know little [about] . . . law and are not much bothered by their ignorance. Their experience tells them that the basic rules that govern ordinary interpersonal affairs are not in the law books anyway." ELLICKSON, *supra* note 106, at 146-47.

174. It appeared that some officers made it difficult for Keith to panhandle (which he did less often than the other regulars). Keith explained that "most of 'em don't let me do it on Broadway." The author was unable to determine the accuracy of Keith's assessment. Police officers who knew Keith denied that he was singled out for harsh treatment. It seemed possible that a bad relationship had developed between Keith and several New Haven beat officers, perhaps because of his heavy drinking.

175. Yale assigned several new officers to the York district beat every few months;

regulars explained, might force them to stop panhandling several days in a row, or order them "not to show up here for a week."[176] For instance, during perhaps the first ten days of a new period of beat assignments, James and Terry had been "pushed around" by two Yale officers they called "the Sunglass Brothers." The Sunglass Brothers had ordered James and Terry to stop panhandling every time they encountered them, and, after a week, they had even arrested the two[177] (although with little surprise in the outcome: no charges were brought). Over time, however, the regulars were able to develop relationships with the new officers, thus reestablishing the practice of general non-interference.[178] The return to non-interference usually involved a combination of two events: not only would individual regulars slowly build up a "way to work things out" (Lou's words) with the officer, but veteran officers would explain to rookies that "the regulars here, us, we can stay" (as Ricky put it).[179] This shift in a new officer's behavior was routine and predictable, according to James. He explained that one officer whom he had come to see as a genuine friend had been "[as] tough as nails when she first got out here." "Now," he said, "she's got a good understanding."

Another variation in routine encounters involved the inverse situation: a veteran officer and a new panhandler. It appeared that officers ordered transients to "move on" far more often than regulars, although just how much more often was unclear.[180] The officers' routine encounters

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the New Haven police assignments to the area remained more constant. Interview with Ron Oates, Sergeant, New Haven Police Department, *supra* note 30.

176. It was not the case that every new officer disrupted the panhandlers' routines. Estimates varied among the regulars, but all believed that somewhat less than half of the new officers allowed the panhandlers to solicit without interference from the time of their initial encounter.

177. Four of the regulars had been arrested between one and three times during the 1990-91 academic year, and apparently every arrest involved either a new officer, or one that the regulars otherwise did not know.

178. Several employees of York district businesses confirmed the pattern of new Yale officers initially being more intolerant of panhandling, and then "mellowing" over time.

179. The panhandlers' belief that the veterans explained their relationships with the panhandlers to the rookies was supported by much experience. John and Lou, for instance, both recalled veteran officers coming to the York district for food or a drink, and pointing out various regulars to the new officers on the street. Ricky usually tried to avoid the disruption of a hostile new cop by introducing himself and explaining that the other officers allowed him "to sit here." If the new officer told Ricky to move anyway, Ricky would leave, confident that the officer's colleagues would explain that "Ricky's okay."

180. Terry and James told an intriguing story of apparent police favoritism that occurred at least twice. In these instances, the two regulars had found themselves crowded out from panhandling on Broadway by a spate of transients. They had stood together

with transients were, as might be expected, more perfunctory. The officers' basic concern[181] was that new individuals were unpredictable—which made the task of policing them more difficult—and the officers thus preferred to discourage them from "setting up shop" in the area. Given the problem of unpredictability (was the individual drunk? combative?), an officer often did not approach a newcomer without first learning if a regular knew something about him. Officers relied mostly on Ricky, John, Fred, James, and Terry, the territory holders in the district, for this information.[182]

Officers also occasionally relied on regulars for information about other criminal activity in the York district, such as descriptions of those who had started street fights, stolen cars or bikes, or shoplifted. Yale Lieutenant Nancy Warren explained: "They see things we don't see. One of our officers will drop by, ask [regulars] if they could describe someone—like someone who just ran off from the 24 Store." Ricky, in particular, cast himself in the role of a security guard; he sometimes referred to himself as "the blockwatcher crimestopper." Most regulars estimated the police asked them about particular crimes or problems several times each month. The questioning was always discrete. "We don't want them getting blamed and hurt," said Sergeant Alonzo.[183] Not only was this information often useful to the police, but it appeared to heighten the credibility of many regulars who claimed that they were "not causing trouble."

The final element of routine encounters involved police *protection* of the panhandlers, particularly the regulars. Panhandlers generally suffered two sorts of injury, harassment and muggings (where the panhandler was beaten and robbed), and officers now and then asked the regulars if they had experienced any problems. The muggings, of course, were more serious. The regulars rightly feared for their personal safety: six stated they had been attacked at least once in the year prior to being interviewed. Yale Lieutenant Warren, who had found John badly beaten once, corroborated the panhandlers' stories: "So many people just don't realize it. They're victimized. We see them bloody and harmed more

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at the edge of the sidewalk, not panhandling. Two officers who knew them had looked over the situation and declared "Hey, there's no room for you guys here. What's going on?" The officers had then ordered the "trespassers" to "move on," leaving the regulars to their usual spots.

181. This information is at least partly based on inference, drawn from brief exchanges with beat officers, as well as from other interviews.

182. Terry appeared amazed that "everyone out here" (referring to the Yale community) did not know that the regulars were a "basic source" of information about a new panhandler for the police.

183. James added, "If something's [been] going down, we tell [the officers] incognito-like; we're quiet about knowin' it."

than we see them do any damage. They're part of [a broader group that includes] . . . street people and homeless types, who some kids in New Haven like to beat up for fun and others want to take whatever they might have [money, liquor] on them." James said that he had been mugged late one night on Broadway, and two police officers had chased after and arrested the assailant, and returned James's money to him (ironically, he said, he had just exchanged a pile of change, which would have been difficult to steal, for a twenty-dollar bill).

The officers also intervened on the rare occasion when they observed a passerby verbally abusing a panhandler. Ricky mentioned that two Yale officers told him regularly that if he was being abused, they would be sure "to look into it." The panhandlers rarely told the officers about their difficulties, however, preferring to solve their problems alone if at all possible. Despite the regulars' often good rapport with the officers, Lou expressed a common sentiment when he said, "the less police, the better."

b. Exit Assistance

The second component of the police regulation of panhandling, "exit assistance," encompassed both informal practices and formal police policy for encouraging the panhandler to leave the York district voluntarily—simply for the day or the evening—because the police believed it was in the panhandler's best interest to go. Exit assistance accounted for possibly ten percent of encounters between panhandlers and police, perhaps less.[184] The forms of exit assistance fell into three categories: formal, informal, and special situations. Unlike routine encounters, exit assistance did not encompass sanctions; in all its forms, the purpose of exit assistance was to help the panhandler.

The primary form of formal exit assistance, implemented when the overnight temperature fell below freezing, was the "Homeless Persons Winter Policy," shared by the Yale and New Haven forces.[185] This policy required an officer who "bec[a]me[] aware" of a homeless individual on the street to ask if the person was willing to go to a shelter.[186] If the person was, the officer arranged transportation either by city-operated

184. This estimate is particularly rough because the formal form of exit assistance described here (the "Homeless Persons Winter Policy") was implemented after most of the interviews with the panhandlers were completed.

185. New Haven Police Department, Homeless Persons Winter Policy (1991) (on file with the *Indiana Law Review*).

186. The officer must first determine if the person "obvious[ly] need[s]" medical treatment, and if so, the officer is to "follow the routine procedures for requesting medical assistance." *Id.* at 1.

van or by police vehicle,[187] or if the person wished, the officer merely provided directions to a shelter. The police had not begun this policy when the panhandlers were interviewed,[188] and therefore, the study has no information about the policy from the panhandlers themselves. Interviews with police officers suggested that several homeless panhandlers in the York district had relied on the service.[189]

Informal exit assistance involved officers helping panhandlers, usually regulars, to return home or to a shelter, generally when the panhandler was too drunk or drugged to function. Significantly, these encounters included instances where the regular's behavior may have constituted disorderly conduct or breach of the peace, but the officers generally did not consider arrest a "productive" option.[190] When John was out very late and got very drunk, one officer noted, he would tell him "you gotta go now, fella." It was better, the officer said, to help steer John toward home than to allow him to risk being seriously hurt by wandering around "til all hours" (once the officer had even hailed John a cab, and paid for it). Yale Lieutenant Marcus added, "there are times when you just say to those [regulars] who've got family,[191] 'It's time to go.' You try to help them call their family, get them home." (In addition, at least one owner-operator, the owner of Toad's Place, had on occasion provided rides to the hospital for certain panhandlers when they were very drunk, and he seriously feared for their health.)[192]

The final form of exit assistance, "special situations," was based entirely upon the panhandler-beat officer relationships. "Special situations" included police requests (or commands) to leave the York district for certain extraordinary events; these incidents of exit assistance could actually be seen as coercive, and grounded less in concern for the regulars' welfare than for maintaining order in the York district. Two such situations came to light. The first involved what appeared to be occasional "sweeps" of the York district to clear it of panhandlers, during which the police usually forced all those on the street to leave, sometimes making several arrests.[193] Several of the regulars, Ricky, James, John,

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187. *Id.* at 1-2. The van was available from December 1 to April 30. *Id.* at 1.

188. *See infra* Appendix on Methodology.

189. Interview with Arthur Alonzo, Sergeant, New Haven Police Department, *supra* note 103. Both police forces also helped homeless individuals and others on the street to obtain emergency medical help, including, in some situations, treatment for alcohol or drug abuse. *Id.* The study did not obtain much information on these events.

190. *Id.*

191. Interview with David Marcus, Lieutenant, Yale University Police, *supra* note 171. Marcus meant "family" in the looser, broader sense here, of any relative or friend in the area.

192. Interview with Mike Spoerndle, Owner, Toad's Place, *supra* note 137.

193. The circumstances under which these sweeps occurred remained unclear; interviews with the police did not yield much information on the subject.

and Terry among them, reported that certain officers would warn them in advance that a sweep was planned, and that they should not come to the York district. James explained that an officer might say to him, "We don't want you to get caught up in all of this business." But although these regulars perceived the police to be "looking out for us," it may be that the officers knew they could rely on a simple request or command to clear the streets of many of the regulars. Second, certain officers insisted that the regulars leave the York district when a "rap" band played at Toad's Place, in the apparent belief that the audience attracted by the band might physically harm the panhandlers. Given the regulars' ready agreement that it would be wise for them to leave,[194] these incidents may have reflected, more than the "sweeps," a purer concern for their welfare—although here again, "sending 'em home" (as one beat officer put it) may simply have eased the officers' task of maintaining order.

c. Arrests

The third part of the police regulation of panhandling, "arrests," included perhaps less than one percent of all encounters. Despite general non-reliance on traditional law enforcement in panhandling matters, the officers did, on rare occasion, arrest panhandlers. Except for run-ins with new beat officers, regulars were almost never arrested.[195] Although the author was unable to obtain either the arrest records of the panhandlers or authoritative data on York district instances of disorderly conduct[196] and breach of the peace[197] (the two Connecticut statutory provisions usually cited when an officer arrested a panhandler), arrests apparently occurred no more than three to five times a month, perhaps a little more, in the York district.[198]

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194. Usually, the panhandlers did not need any encouragement in such situations, and would leave of their own accord. Lou refused to analyze the apparently negative relations between the panhandlers and some New Haven youths; he merely stated, in vivid terms: "You don't sit at the top of the mountain when a hurricane comin', now do you?"

195. Linda, however, occasionally was arrested. According to Keith, this occurred when she was excessively drunk and especially combative when an officer asked her to leave the area. He could recall "a few" instances when this had occurred, but was unhelpful in providing any more detail. Sergeant Ron Oates implied that Linda could, sometimes, become "so ornery" that officers would simply lose their patience with her, and arrest her out of frustration.

196. CONN. GEN. STAT. ANN. § 53a-182.

197. CONN. GEN. STAT. ANN. § 53a-181.

198. This estimate is a "rough and ready" calculation arrived at through conversations with police, prosecutors, businesses, and the panhandlers themselves.

Most arrests appeared to follow a particular pattern, usually involving a combination of especially disruptive or threatening behavior[199] and repeated unresponsiveness to a series of police encounters, often fueled by alcohol or drugs. The arrests usually served one purpose, according to one of the officers: "to get them off the street for a moment, while they're at their worst."[200] The regulars and the officers described the pattern in similar terms. Generally, both Ricky and John explained, when a transient panhandler or neighborhood drunk began to harass passersby, an officer would approach the person within an hour (sometimes first talking to a regular about the person if the officer did not recognize him[201]). Officers would usually warn the offender to "calm down" and tell him to "move on." Arrests followed in two circumstances. Either the panhandler would leave and then return, and a cycle of warnings followed by departures and returns would ensue; or, more rarely, the panhandler would challenge the officer and refuse to stop "whatever his little thing was" (John's words). If, after repeated warnings and discussion, the officer could not convince the individual to leave, the officer would arrest him. Ricky emphasized the concept of fair notice, saying, "they get told, they get told, they get told again—get outta Dodge, boy—mostly, takes a while before they run 'em in." Most arrests, New Haven Sergeant Alonzo observed, came later at night, and the panhandler would spend the night in jail. The next morning, as usual, the prosecutor would decide not to press charges, and the panhandler would walk out.

No player in the York district panhandling drama, with the exception of some owner-operators, seemed to favor arrests. It goes without saying that most panhandlers did not enjoy being arrested.[202] Moreover, an arrest absorbed police time, with little if any perceived long-term gain;[203] it annoyed prosecutors, who, as stated, simply had no time for most disorderly conduct or breach of the peace charges;[204] troubled the regulars,

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199. Ricky cited two examples of behavior he had seen lead to arrest: one man was poking and yelling at passersby, another was following particular people and holding on to them, shouting "give me some money NOW, give me some money NOW." Ricky added that despite repeated requests by the police, neither individual had left the York district, and this refusal had apparently led to their arrest.

200. Interview with Nancy Warren, Lieutenant, Yale University Police, *supra* note 30.

201. *See supra* text accompanying note 182.

202. The study included no interviews with transients who had been arrested in New Haven, although the regulars uniformly described arrest as an unpleasant experience.

203. *See supra* notes 155-59 and accompanying text. New beat officers, who made most of the arrests of panhandlers, presumably did not perceive arrests as negatively as did veterans.

204. *See supra* note 157 and accompanying text.

because it both reminded them of the officers' power (which some continually feared might be turned against them[205]) and it reflected the presence of "some clown, some idiot" (Fred's words) who had been disturbing the pedestrians; and finally, it angered many Yale students, who, according to one Yale officer, "stand and watch, get all concerned because they're afraid you're hurting someone. It doesn't make us look good." Then she added, "Except I guess some Yale-types like it when they think we're getting tough. And you see some stores [the owners of which are] happy."

In sum, the regulation of panhandling in the York district had a distinct structure and a complex set of rules—but the structure and rules were only marginally related to the formal legal provisions that might have been assumed to govern panhandling in the area. Indeed, reference to the relevant statutory prohibitions against breach of the peace and disorderly conduct were all but irrelevant to the way panhandling was controlled. Ongoing relationships and a constellation of understandings among panhandlers, police, and York district businesses were the important sources of control. Those relationships and understandings provided an exceedingly "thick" regulatory regime, extending, for example, from the broad, overarching agreement that veteran officers generally would not interfere with the regulars' panhandling, all the way down to the intimate details of the panhandling enterprise, such as John withdrawing his cup in the presence of a particular officer.

This description of panhandling calls for a reassessment of the relevant questions for the legal community to address when attempting both to understand panhandling and to bring about effective change in its regulation. Rather than focusing on the nuances of the ostensibly applicable legal doctrine, two more pragmatic questions present themselves: (1) when can a lawyer expect to encounter an environment or activity that is primarily governed not by law, but by other, less formal social controls? and (2) where less formal social controls hold sway, what role can the lawyer play in bringing about meaningful change? The conclusion considers these two questions.

V. Conclusion

The primary purpose of this Article had been to demonstrate, on the micro level, that the formal legal structure designed to regulate panhandling in Connecticut had only a marginal impact on the actual

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205. Indicating a belief (which evidently clashed with the officers' view) that the police could, practically speaking, entirely prohibit panhandling whenever they wished, Lou said: "Yeah, they can arrest me, I guess. It's not happening too much, but it could, it could."

regulation of that activity in the York district. As noted earlier in the Article,[206] the law's potentially limited influence on panhandling seems generally to have been lost on much of the legal community. The law review articles that treat panhandling operate on the core assumption that the relevant legal rules have a powerful effect on the street. These articles therefore devote countless pages to tinkering with First Amendment doctrine in order to defend panhandler's rights. This myopic approach reflects "legal centralism,"[207] that is, "the belief that governments are the chief source of rules and enforcement efforts."[208] The experience of the York district panhandlers indicates that a wider view of social control—a view that encompasses more than merely the formal legal scheme—is necessary if lawyers and legal scholars are adequately to understand the regulation of panhandling in a community such as the York district. This conclusion therefore considers the broader relationship between law and other forms of social control, and then explores the role of the lawyer when law has little influence.

A. When Does Law Matter? Of Police Practice and Other Issues

Perhaps the most important question raised by this study flows from the Article's fundamental point that law's impact on human affairs is sometimes quite limited. Specifically, when does law matter, and when does it not? In more precise terms, what variables determine whether law or other, less formal types of social control will be the primary controllers of human behavior in a particular environment? Currently, there is no satisfactory answer to this question. As Robert Ellickson notes, "[l]aw-and-society scholars would be the first to admit . . . that they are a long way from having a general theory of social control."[209] Nevertheless, the law and society movement has made some progress toward developing such a theory,[210] and law and society scholars have identified at least some of the key factors that account for whether human transactions will be governed primarily by formal legal rules or by more informal means.[211]

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206. *See supra* notes 8-10 and accompanying text.

207. Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 73 AM. ECON. REV. 519, 520 (1983).

208. ELLICKSON, *supra* note 106, at 138. On the pervasiveness of legal centralism in American legal thought, see *id.* at 138-39.

209. *Id.* at 149.

210. *See, e.g.*, TOWARD A GENERAL THEORY OF SOCIAL CONTROL (Donald Black ed. 1984).

211. *See* ELLICKSON, *supra* note 106, at 283 ("[D]isputants are likely to turn to legal rules when the social distance between them increases, when the magnitude of what is at stake rises, and when the legal system provides an opportunity for the disputants to externalize costs to third parties.").

This Article sheds some light on one such factor—social distance. Today, law and society scholars generally embrace the principle that the greater the amount of social interaction among the parties to a dispute or transaction, the less likely it is that the formal legal scheme will govern that dispute or transaction.[212] This "social distance" principle has been examined largely in the context of transactions solely involving private parties, such as contractual relationships between businesses in Wisconsin.[213] But the social distance principle has remained relatively untested in those situations where the interactions at issue arise between private parties (here, the York district panhandlers) and agents of the state charged with enforcing the state's laws (here, the Yale and New Haven police). When police officers and private citizens have an ongoing relationship, does this relationship (that is, lack of social distance) influence whether the police go "by the book" and apply the law straightforwardly in their dealings with those citizens?

The findings presented here suggest that the social distance principle is indeed relevant to police officers' decisions about enforcing the law (through arrest or an order to leave the area). As discussed, the ongoing relationships among the police and the regular York district panhandlers appeared to be one of the principal factors accounting for the police officers' reluctance to rely on law to control panhandling.[214] In fact, those relationships may have been the single most important factor accounting for that reluctance. To be sure, it appears that both the costs and the apparent pointlessness of enforcing Connecticut's disorderly conduct and breach of the peace statutes also affected the officers' decisions generally not to rely on formal legal rules.[215] But these two additional factors were equally applicable to enforcement of the statutes against either regular *or* transient panhandlers, and yet the transients—whom the officers did not know—were arrested far more often than the regulars. Moreover, officers newly assigned to the York district were far more likely than veteran officers to arrest a regular for disorderly conduct or breach of the peace, and such arrests and demands to leave the York district by new officers declined almost to nil as the new officers became acquainted with the regular panhandlers on their beat.[216]

In turn, the regular panhandlers did not even contemplate resorting to the legal process when they had a complaint about a police officer's behavior. Thus, for example, James and Terry simply absorbed the abuse

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212. *See* DONALD BLACK, THE BEHAVIOR OF LAW 40-46 (1976).

213. *See* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

214. *See supra* Part IV.C.

215. *See id.*

216. *See id.*

that the "Sunglass Brothers" gave them until the two officers began to tolerate their panhandling.[217] Similarly, Ricky redoubled his efforts to become friends with those officers who did not let him panhandle when they were first assigned to the York district. The panhandlers' failure to seek legal help when the officers disregarded their (legal) right to panhandle might, of course, be traced in part to the panhandlers' not knowing that panhandling was legal.[218] But even when the author informed several of the regulars that the officers did not have the authority to prohibit panhandling, the regulars rejected outright the notion of pursuing legal action, fearing that they would jeopardize their generally good relationships with most officers.

The conclusion that the social distance principle may extend to relationships between police and private citizens serves to strengthen that principle as a building block in the overall development of a general theory of social control; it also poses additional research issues. For instance, what is the significance of social distance as an explanatory factor, relative to other factors, in determining whether legal rules or more informal norms provide the primary source of control in police regulation of a particular environment or activity? Although close relationships between police and citizens emerged as paramount in this study, one researcher has already found that police refusal to operate "by the book" may exist independently of ongoing relationships between police and the regulated group. In a large study involving police in Boston, Chicago, Washington, D.C., and other cities, Donald Black found that the police generally did not rely on law to settle disputes—but in Black's study, in contrast to this one, the police did not know the citizens whose disputes they were resolving.[219] The varied conclusions of this Article and Black's study indicates that much work remains to be done in researching police-citizen relationships before there can be a fully satisfactory assessment of the role of those relationships in determining whether the police go "by the book."

Beyond the specific question of police-panhandler relationships, this Article raises numerous other issues regarding both law's limited applicability to human affairs and the influence of other forms of social control. For example, in those contexts where human transactions are governed by informal norms as well as (or more than) by law, is it possible to predict the content of those norms? Specifically, was it predictable that the panhandlers in the York district would work out

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217. *See id.*
218. *See id.*
219. *See* BLACK, *supra* note 146, at 186.

certain rules among themselves that served to increase their panhandling income?[220]

Recent theoretical work suggests that the existence of such rules might have been predicted. Robert Ellickson recently pointed out that "[m]ost law-and-society scholars shy away from all theories of the content of norms."[221] In an attempt to break ground in this area, Ellickson hypothesizes that "members of a close-knit group will develop and maintain norms whose content serves to maximize [their] aggregate welfare" in certain circumstances.[222] Although it was suggested earlier in the Article that the group of regulars in the York district did not meet the conditions under which Ellickson's hypothesis is most likely to apply,[223] it seems that the rules the regulars adhered to at least approximated the type of norms that Ellickson's work might have predicted. This finding provides modest support for the suggestion that Ellickson's hypothesis might apply in some modified form even when the precise conditions he sets out do not obtain.[224] Thus, among the more important research questions in this area is whether Ellickson's hypothesis can indeed predict the substance of informal norms for a broader range of human affairs than he initially suggested.

In pressing the point that formal legal rules may not always have much real-world influence, this Article also poses a somewhat unsettling question for the practicing lawyer. The last section addresses that question.

B. When Law Does Not Matter: The Role of the Lawyer

When law does not have much impact on human affairs, and more informal forms of social control hold sway, the law and society scholar is presented with rich opportunities to describe, explain, and predict the effects of those other forms of social control. For the lawyer, the recognition that law may have minimal influence presents more troubling implications. In some circumstances, a lawyer's work might be more or less irrelevant. In some circumstances, a lawyer might not—at least through the legal process—be able to bring about meaningful, real-world change:

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220. *See supra* Part IV.A.

221. ELLICKSON, *supra* note 106, at 154.

222. *Id.* at 167 (emphasis omitted).

223. *See supra* note 106. These conditions include, for example, that members of a group have considerable power over one another, and opportunities to exercise that power to enforce the norms at issue. *See id.*

224. Ellickson remains "agnostic" about whether welfare-maximizing informal norms will arise in settings other than those involving "close-knit groups." ELLICKSON, *supra* note 106, at 154.

> The proposition that legal rules may lack bite is of particular importance to the legislators, lawyers, policy analysts, and others who aspire to be social engineers. These legal activists have been especially prone to exaggerate what the Leviathan can accomplish. For a wide variety of reasons, legal interventions can flop. To avoid the frustration of trying to influence what is beyond their reach, legal instrumentalists would be wise to deepen their understanding of the nonlegal components of the system of social control.[225]

Indeed, whether a lawyer seeks to protect the rights of panhandlers in the York district (for example, by preventing new beat officers from interfering with the regulars) or wishes to draft a city ordinance restricting panhandling, she may find that her attempts at "social engineering" will change little, if anything, on the street. The panhandlers' advocate might not even be able to find a regular willing to challenge the actions of the more unsympathetic officers, given the aversion several of the panhandlers expressed toward trying to settle their problems with the police in court. Similarly, the would-be drafter of a city ordinance would discover that the police officers familiar with the York district would be highly reluctant about enforcing such a restriction, and that in any event, the officers believed they lacked the resources to enforce it. In short, regardless of the desired end in attempting to change the law applicable to panhandling in the York district, those attempts at change could well "flop."

That said, the lawyer's challenge in such a setting is probably to recognize what the law cannot do, and to seek alternative, non-legal measures to address the concerns raised by the various York district constituencies. For example, to the extent that aggressive panhandling was a problem in the York district, such panhandling might be reduced through the adoption of a voucher program similar to the one recently launched in Berkeley, California.[226] Under this program, pedestrians may buy and then give to panhandlers coupons that are redeemable at participating stores only for food, public transportation, and so on. A voucher program might reduce aggressive panhandling in two ways. First, alcoholics and drug addicts (generally the most aggressive panhandlers in the York district) may over time be discouraged from panhandling in an area where they know that much of their panhandling income is likely to come in the form of vouchers that will not provide them with

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225. *Id.* at 281-82 (footnote omitted).

226. *See* Max Boot, *Voucher Program Launched in Berkeley to Care for Homeless*, L.A. TIMES, May 7, 1991, at A3; Katherine Bishop, *Plan Aims to Insure That Beggars Don't Put Cash in Wrong Pockets*, N.Y. TIMES, July 26, 1991, at A10.

alcohol or drugs. Second, by limiting a panhandler's ability to purchase alcohol or drugs, the panhandler may be drunk or on drugs less often than he otherwise would. Given that certain regulars in the York district became aggressive in their panhandling only when chemically impaired,[227] reduced access to alcohol and drugs could produce fewer incidents of confrontational panhandling.

A voucher program is not a panacea.[228] In the York district, it might lead some panhandlers simply to use all their General Assistance benefits to buy liquor or drugs, and to rely on the vouchers they received from pedestrians to buy food and other necessities. It is also conceivable that a resale market in the coupons could arise, enabling one panhandler to sell coupons at a discount to another panhandler for cash, which the seller could then use to purchase those goods that the voucher system meant to make less available.[229] Despite these possible drawbacks, however, such a program is at least not dependent on enforcement of legal rules, and may offer some hope of bringing about positive, measurable change in the York district environment. (Moreover, this creative approach to enhancing social order imposes no constraints on a panhandler's individual liberty. Although it has been contended that "we" have no business making choices about whether the extremely poor should be allowed to face reality drunk, drugged, or otherwise,[230] there is nothing in a voucher program to prevent a panhandler from receiving a cash handout—which he could use to buy, say, alcohol—from a pedestrian who chooses to give cash rather than a voucher.)

Suggesting that lawyers seek non-legal means to accomplish particular objectives in certain circumstances is not at all to deny that social change may be effected through resort to courts and legislatures. Rather, it is a pragmatic response to the recognition that law's impact is not always as wide or as deep as we in the legal profession are often tempted to believe. When lawyers and legal scholars focus only on the significance of formal legal arrangements, they may fail to understand, and thus fail to have any impact on, and the complex and varied set of controls that actually operate in the messy reality of human affairs. Just ask Ricky, on any Thursday night in New Haven, whether his right to

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227. *See, e.g., supra* note 109.

228. Ten months after the Berkeley voucher program was introduced, a Berkeley city official stated that he believed drinking and drug use were down among the city's panhandlers. Telephone interview with Eric Landes-Brennan, Homelessness Coordinator for the City of Berkeley, California (Mar. 26, 1992). Landes-Brennan had only anecdotal evidence to support this belief.

229. As noted, some panhandlers reported a resale market for food stamps. *See supra* note 49.

230. *See* Abrahams, *supra* note 93, at A26.

panhandle depends more on the First Amendment or on the police officers he knows.

Appendix on Methodology

Information for this study was gathered in face-to-face interviews with panhandlers, and face-to-face and telephone interviews with police officers, owners and employees of York district businesses, executive branch employees at both the state and local levels, prosecutors, and more informally, volunteers at soup kitchens and pedestrians that the panhandlers knew well.[231] This Appendix briefly discusses the way the panhandlers were interviewed. While the author spoke with eighteen panhandlers in total, only twelve were interviewed at length.[232] As an incentive to be interviewed, each panhandler was offered a choice of ten dollars or a meal at a local restaurant. Before approaching the first few panhandlers, the author usually observed them, from a distance, for up to thirty minutes. This period generally allowed a rough determination of whether the individual was lucid, and, based on his apparent disposition, how the author might best introduce himself and the study. The author approached the first several panhandlers with no previous information on them, those initial interviews provided significant background on the rest of the panhandling community. From then on, a considerable amount was known about each panhandler before meeting him.

An extensive outline of questions formed the basis of each interview. The author generally diverged from the outline, however, seeking the

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231. Interviews with panhandlers were conducted from February through May of 1991. After a preliminary draft of this Article was prepared in the summer of 1991, the author decided to extend the study. Discussions with police, business owners, and others were conducted informally during November 1991, with more formal interviews in March 1992. Because of the lapse of time, several of the regular panhandlers were reinterviewed during this period, largely to corroborate statements made by other interviewees, particularly police officers. (Ten of the twelve regulars in the York district in May 1991 were still on the street in March 1992, although there were a number of new panhandlers in the district, as well.)

232. The other six were not interviewed for different reasons. Two refused to be interviewed, apparently because the offer of ten dollars or a free meal was insufficient. These two panhandlers were probably transients, for the author never saw them again, and the other regulars could not identify them when provided with descriptions. Two more simply failed to meet the author at the agreed time; the author never saw these two again, either, nor were others able to identify them. Finally, two of those approached appeared to be so mentally ill that the author was unable to conduct a productive interview with them. These two were present at least two or three times a month in the York district, and, after initially seeing them attempt to panhandle when beginning the study, the author never witnessed either one panhandle again.

topic each particular panhandler found least intrusive or threatening (for example, the relative merits of various local soup kitchens) before covering more sensitive areas (how the panhandler had lost his last job, whether he drank). Almost all of the interviewees, after shedding their initial suspicion and inhibitions, were candid about their experiences. Several of the most insightful and articulate panhandlers were interviewed several times, and the author continued to maintain contact with many of the regulars through the summer of 1992. This ongoing contact was absolutely crucial to the study, for it enabled numerous gaps from interviews to be filled, and equally important, allowed corroboration of much of the information obtained from other panhandlers. The author was thus often able to determine, through questioning previous interviewees, when someone had exaggerated or completely falsified important information.[233] Two of the panhandlers who had worked the York and Broadway neighborhood for a long time, Ricky and John, were particularly helpful in this regard.

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233. This is not to say that the study does not suffer from certain panhandlers' misrepresentations, or, for that matter, from the author's misunderstandings. While some information believed to be false has been omitted, at least some misrepresentation probably has infected the study. Many of the panhandlers, at various points in their interviews, appeared ashamed of their circumstances, and may have been less than forthright in their accounts. However, the misrepresentations and omissions may relate more to the events that led to each panhandler's current situation than to the details of that situation itself. This is because the panhandlers seemed to feel far more uncomfortable about explaining how they had ended up in their present circumstances; they were rarely reticent when discussing their current experiences.

The Essential Purpose and Analytical Structure of Personal Jurisdiction Law

Roy L. Brooks*

Introduction

In *Wonderful Life: The Burgess Shale and The Nature of History*,[1] Harvard paleontologist Stephen Jay Gould tells us that evolution has no essential direction or purpose. Indeed, if the tape of life were rewound and replayed from any earlier point, we would get a completely different set of species. Homo sapiens, with an existence spanning only a quarter of a million years—a mere geological moment when one considers that the splitting point between human and chimpanzee ancestors was six to eight million years ago—probably would not even be included in this new array of species.

To many proceduralists, the Supreme Court's opinions concerning personal jurisdiction have the same quality of purposelessness[2] as the evolutionary process described in Professor Gould's marvelous book. *Burnham v. Superior Court of California*,[3] the Supreme Court's most recent important opinion on personal jurisdiction, is often presented as Exhibit A in support of this claim.[4] *Burnham*, it is argued, adds to the lack of direction in personal jurisdiction law less because of its failure to promulgate bright line rules than because of two other reasons. First, *Burnham* breathes life into the ancient doctrine of transient jurisdiction

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* Professor of Law, University of San Diego; J.D., Yale University, 1975. Special thanks to Jack Cound and Roger Parks of the University of Minnesota Law School, with whom I spent many hours discussing personal jurisdiction during my appointment to the Minnesota faculty in 1990-91. I am very grateful to Martin Buckley and Sonia Church for providing excellent research assistance.

1. Stephen J. Gould, Wonderful Life: The Burgess Shale and The Nature of History (1989).

2. *See generally* James S. Cochran, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 Tex. L. Rev. 1463 (1986); Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure §§ 1064-74 (1992).

3. 110 S. Ct. 2105 (1990). For a full discussion of this case, *see infra* text accompanying notes 147-76.

4. *See, e.g.*, Linda Silberman, *Reflections on Burnham v. Superior Court: Toward Presumptive Rules of Jurisdiction and Implications for Choice of Law*, 22 Rutgers L. J. 572 (1991); Allan R. Stein, *Burnham and the Death of Theory in the Law of Personal Jurisdiction* 22 Rutgers L. J. 597 (1991); Martin H. Redish, *Tradition, Fairness, and Personal Jurisdiction: Due Process and Constitutional Theory after Burnham v. Superior Court*, 22 Rutgers L. J. 675 (1991).

that traces back to *Pennoyer v. Neff*.[5] Indeed, some lower courts have held that *International Shoe Co. v. Washington*[6] or *Shaffer v. Heitner*[7] invalidated transient jurisdiction.[8]

Second, a majority of the Justices in *Burnham* did not employ the *Burger King-International Shoe*[9] analytical framework in explaining or resolving the jurisdictional issue.[10] When *Burnham* was decided, the *Burger King-International Shoe* formula was the standard method of understanding and resolving questions of personal jurisdiction. This formula comes into play once it is determined that a state long-arm statute reaches the case *sub judice*. At that juncture, a court must decide whether the exercise of personal jurisdiction is constitutional under the Fourteenth Amendment Due Process Clause.[11] This constitutional determination is made by asking whether jurisdiction over the person or property comports with "fair play and substantial justice";[12] meaning whether "minimum contacts" between the defendant and the forum state exist and whether the exercise of such jurisdiction is otherwise reasonable.[13] In *Burnham*, only Justice Brennan's group used the formula,[14] and even there it could be argued that the formula was misapplied because it strains reason to assert that a nonresident served with process while only temporarily present in the forum state had established minimum contacts.[15]

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5. 95 U.S. 714 (1877). Stanley Cox, for example, criticizes Scalia's opinion in *Burnham*, arguing that "Scalia . . . rechampions discredited territoriality method for measuring the constitutionality of jurisdictional reach." Stanley E. Cox, *Would that Burnham had not Come to be Done Insane! A Critique of Recent Supreme Court Personal Jurisdiction Reasoning, an Explanation of why Transient Presence Jurisdiction is Unconstitutional, and Some Thoughts about Divorce Jurisdiction in a Minimum Contacts World*, 58 TENN. L. REV. 497, 538 (1991).

6. 326 U.S. 310 (1945).

7. 433 U.S. 186 (1977).

8. *See,e.g.*, Nehemiah v. Athletics Congress of U.S.A., 765 F.2d 42, 46-47 (3d Cir. 1985) (service of process on a person voluntarily present in the forum state does not survive *Shaffer*). *See also infra* cases cited in note 15.

9. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *See also* Redish, *supra* note 4, at 684 (discussing modern due process analysis employed by the Court).

10. *See infra* text accompanying notes 147-76.

11. The two step analysis is illustrated in World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 289-90 (1980). For an example of state codification of the rule, see OKLA. STAT. tit. 12, § 1701.03 (a)(4)(197)(West 1981 & Supp. 1984) (jurisdiction must be tested against both statutory and constitutional standards).

12. *See* Abramson, *infra* note 22, at 444-68 (discussion of "fair play and substantial justice").

13. *See Burger King*, 471 U.S. at 471-78; *infra* text accompanying note 130. *See also* World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (White, J.) (asserting that the defendant's interest is most important when assessing these factors).

14. *Burnham*, 110 S. Ct. at 2124-26. *See infra* text accompanying notes 159-63.

15. *See* Harold M. Pitman Co. v. Typecraft Software Ltd., 626 F. Supp. 305,

Is personal jurisdiction law as purposeless as the absence of a bright line rule, the resurrection of transient jurisdiction, and the nonapplication or misapplication of the *Burger King-International Shoe* conceptual scheme seem to suggest? Is this area of the law as random as evolution? Does it have no essential direction?

Clearly there is an element of unpredictability in personal jurisdiction law, but no more or no less than in any other area of the law. As Holmes stated:

> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man.[16]

But to say that personal jurisdiction law is uncertain—in that one cannot predict the outcome of cases—is not to say that it has no jurisprudence. I argue in this Article that all the characteristics of personal jurisdiction law mentioned above only establish the unpredictability of personal jurisdiction law; that, contrary to what other scholars are suggesting, the law of personal jurisdiction has an essential direction, a central goal, and is not as random or purposeless as evolution.

As I attempt to clarify the essential purpose of personal jurisdiction law, I shall also try to explain the contours of the Supreme Court's analytical framework designed to facilitate or vindicate this essential purpose. Clearly, the *Burger King-International Shoe* conceptual scheme did not control the Court's jurisdictional analysis in *Burnham*. That does not necessarily mean that the Court's thinking was unstructured. The Court was guided (and has always been guided) by a process of analysis more subtle and fundamental than that formulated in *Burger King-International Shoe*.

Part I of this Article states my basic thesis regarding the essential direction of personal jurisdiction law and its analytical framework, demonstrating that the goal and decisionmaking process of personal jurisdiction law are symbiotically related. Part II offers proof of the basic thesis set forth in Part I, primarily focusing on the most important Supreme Court cases on personal jurisdiction handed down since *Pennoyer v. Neff*.

I. The Thesis

Far from being a rogue case, the decision in *Burnham* is compatible with a form of jurisdictional analysis that drives personal jurisdiction

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310-14 (N.D. Ill. 1986); Bershaw v. Sarbacher, 700 P.2d 347, 349 (1985). *See generally* Cox, *supra* note 5, at 518-30 (propounding that *Burnham* was wrongly decided).

16. Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465-66 (1897).

decisionmaking. The constitutional sufficiency test—whether it is called "fair play and substantial justice," "minimum contacts," the "power theory," or something else—functions as a balancing test.[17] The purpose of this test is to help courts decide cases in a way that is consistent with the essential direction of personal jurisdiction law.

The essential direction of such law is to determine who should travel. In other words, most personal jurisdiction cases that are litigated involve defendants who are nonresidents of the forum state.[18] In these cases, someone—either plaintiff or defendant—has to travel. The question, then, is whether it is fairer for the plaintiff or the defendant to travel.[19]

Based on the foregoing propositions, my thesis is that the essential purpose of personal jurisdiction law is to determine who should travel. Deciding whether it is fairer, within the meaning of the Due Process Clause,[20] for the plaintiff or the defendant to travel, the Court proceeds from a policy-oriented perspective whereby it identifies and balances all the relevant interests or policies inherent in the litigation.[21] These interests or policy considerations, consist mainly of the plaintiff's interests, the defendant's interests, and, to use a cumbersome term, other relevant interests in the litigation.[22] The defendant's interests include its ties to

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17. World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 289-301 (1980) (Brennan, J. dissenting) (asserting that the Court must consider the interests of the state and the other parties when determining whether the exercise of jurisdiction is constitutional).

18. *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978); World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1985); Burnham v. Superior Court, 110 S. Ct. 2105 (1990); Shaffer v. Heitner, 433 U.S. 186 (1977).

19. With his usual perspicüity, Judge Learned Hand saw this as the ultimate question in personal jurisdiction. In a case involving the legal fiction of "corporate presence," he stated:

> In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no *vade mecum*.

Hutchinson v. Chase and Gilbert, 45 F.2d 139, 142 (2d Cir. 1930).

20. *See Pennoyer*, 95 U.S. at 733; *International Shoe*, 326 U.S. at 311.

21. *See* Earl M. Maltz, *Visions of Fairness-The Relationship Between Jurisdiction and Choice-of Law*, 30 ARIZ. L. REV. 751, 755 (1988) (arguing that Justice O'Connor's decisionmaking rests on policy considerations). *But see* Paul C. Wilson, *A Pedigree for Due Process? Burnham v. Superior Court of California*, 56 Mo. L. REV. 353, 381 (1991) (arguing that the Court's decisionmaking is essentially predicated on territoriality). *See infra* note 40.

22. I have reduced to three the five components of "fair play and substantial justice" laid out in Burger King v. Rudezewicz, 471 U.S. 462, 476-78 (1985), which are as follows: 1) "the burden on the defendant;" 2) "the forum State's interest in adjudicating

the forum state (what *Burger King-International Shoe* calls "minimum contacts"). Other relevant interests in the litigation may include the forum state's interests shaped by the particular facts of the case (which can be viewed as expressions of "power" in the *Pennoyer* sense[23]), and the social goals of civil procedure.[24] This jurisdictional approach can be called "interest analysis."[25]

Several observations should be made about interest analysis. First, it is flexible enough to absorb all the major expressions of the constitutional sufficiency test handed down since *Pennoyer*: the "power theory" (*Pennoyer*'s test); "minimum contacts" (*International Shoe*'s test); and "fair play and substantial justice" (*Burger King-International Shoe*'s test). Each of these tests, even the "power theory" test, merely provides a conceptual vehicle for accessing the constitutional idea of fairness, whether it is fairer for plaintiff or defendant to travel. Second, because it is nonmechanical in its approach to personal jurisdiction, interest analysis is squarely within the path or spirit of *International Shoe*, which remains the most important case on personal jurisdiction.[26] Finally, interest analysis lives in the factual pattern of particular cases. The nature of the various interests at stake or policy clashes depend entirely upon the facts of each case. Hence, the meaning of fairness changes from

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the dispute;" 3) "the plaintiff's interest in obtaining convenient and effective relief;" 4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies;" and 5) "the shared interest of the several States in furthering fundamental substantive social policies." *See also* Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L. Q. 441 (1991).

23. The "power theory" or border test provides that a state has all power over persons or things within its borders and no power over persons or things without its borders. *See infra* text accompanying notes 30-31. State sovereignty is given great weight in *in rem* cases. *See, e.g.*, Arndt v. Griggs, 134 U.S. 316, 323, 327 (1890); Shaffer v. Heitner, 433 U.S. 186, 207-08 (1977); *See also* Hans Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 617 (1977) (maintaining that tangibles which have a continual presence within the state are integral to the social and legal life of the state).

24. *See* FED. R. CIV. P. 1: "[t]hese rules shall govern the procedure. . . . They shall be construed to secure the just, speedy, and inexpensive determination of every action."

25. *See* Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion*, 18 HASTINGS CONST. L.Q. 819, 847, 848, 858 (1991) (the author proclaims that "the due process methodology established by the radical changes of the 1930's and 1940's is essentially an 'interest analysis' and an accommodation approach under which the Court has developed social-functional standards. . . .").

26. Personal jurisdiction should not turn on "mechanical" tests. *International Shoe*, 326 U.S. at 319.

case to case.[27] Fairness cannot be molded into a convenient, neatly packaged rule of law. This is precisely why personal jurisdiction is so unpredictable.

Part II of this Article revisits several Supreme Court cases to examine the extent to which the decision or opinion in each of these cases rests on a fair balance of relevant interests in the litigation: the plaintiff's, the defendant's, and the state's, the latter being the most recurring and important "other relevant interest."[28] I shall begin with *Pennoyer* and proceed chronologically to *Burnham*.

II. The Evidence

A. Pennoyer v. Neff.[29]

The critical facts in this case are as follows. Plaintiff Neff's property was sold to defendant Pennoyer pursuant to the execution of a default judgment entered against Neff in a prior *in personam* suit brought by one Mitchell in Oregon state court. At the time of Mitchell's suit against Neff, the latter was neither a resident of nor physically present within the forum state. Plaintiff Neff initiated the *Neff v. Pennoyer* action (which on appeal became *Pennoyer v. Neff*) in federal court to regain possession of his property. The jurisdictional issue in the federal action concerned the validity of the judgment rendered in Mitchell's *in personam* action in Oregon against the nonresident and absentee Neff. The Supreme Court held that the *in personam* judgment was invalid because Neff was not personally served with process while physically present in the forum state. Thus, a valid *in personam* judgment requires personal service on the defendant while he or she is present within the forum state. This is sometimes called "presence jurisdiction," "transient jurisdiction," or "in-state service of process."

The rationale behind the Court's holding is also the *Pennoyer* test for determining the legal sufficiency of any assertion of personal jurisdiction in state courts. It is commonly referred to as the "power theory,"

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27. *See* Gray v. American Radiator & Standard Sanitary Corp., 176 N.E.2d 761, 765 (Ill. 1961) ("[w]hether the type of activity conducted within the State is adequate to satisfy the requirement depends upon the facts in the particular case. . . . The question cannot be answered by applying a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable in the circumstances.").

28. Some would argue that territoriality, or the forum state's interest, is the most important if not the only consideration on which the Court relies. *See, e.g.*, Abramson *supra* note 22, at 451; Wilson, *supra* note 21, at 381.

29. 95 U.S. 714 (1877).

or "borders test":[30] a state has exclusive power over persons or things within its borders, and no power over persons or things outside its borders.[31] The Oregon state court violated the second half of the power theory when it attempted to exercise its authority over defendant Neff who was outside the forum state at the time of service of process.

Several observations should be made about the Court's treatment of the power theory and about the fairness of its decision. First, the power theory was not a theory of constitutional law prior to *Pennoyer*. Rather, it was a common law concept of comity, borrowed from international law and conflict of laws.[32] The *Pennoyer* Court recognized, however, that questions of personal jurisdiction must thereafter be determined under the Fourteenth Amendment Due Process Clause.[33] In subsequent cases, the power theory became the edifice of analysis for assessing the constitutionality of jurisdictional assertions.[34]

Second, the power theory is not as inflexible as its statement would seem to suggest. Its approach to personal jurisdiction can be as nonmechanical as minimum contacts or fair play and substantial justice. Hence, decisions based on the power theory can be as unpredictable as those based on other expressions of constitutional sufficiency.

To understand this perspective on the power theory, one must turn to the *Pennoyer* opinion itself, which was written by Justice Field. After stating the power theory with great force and authority early in the opinion,[35] Justice Field, beginning in the very next paragraph, devotes most of the balance of the opinion to carving out exceptions and limitations to the power theory. For example, the Court notes that as to contracts made and property held by nonresidents, "the exercise of

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30. For a discussion of the "power theory" *see* Joel H. Spitz, *The "Transient Rule" of Personal Jurisdiction: A Well-Intentioned Concept that has Overstayed its Welcome*, 73 MARQ. L. REV. 181 (1989) (asserting that the transient rule that developed from *Pennoyer* is outdated and should be abolished). *See also* Cox, *supra* note 5, at 503-17 (discussing the background of the "power theory").

31. *Pennoyer*, 95 U.S. at 722.

> And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Id. Arguably, however, the concept of "transient" jurisdiction is in conflict with the constitutionally guaranteed right to travel. *See, e.g.*, Wilson, *supra* note 21, at 360; Brilmayer, Logan, Lynch, Neuwirth & O'Brien, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 723, 753 (1988).

32. *Pennoyer*, 95 U.S. at 722 (citing authorities).

33. *Id.* at 733.

34. *See, e.g.*, Arndt v. Griggs, 134 U.S. 316 (1890); Harris v. Balk, 198 U.S. 215 (1905).

35. *Pennoyer*, 95 U.S. at 722.

the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it.''[36] Later, the Court discusses numerous other exceptions to or limitations on the power theory, such as nonresident corporations,[37] the Full Faith and Credit Clause,[38] and consent.[39] These exceptions or restrictions on the power theory were necessary to make the exercise of jurisdiction under the power theory fair. So the *Pennoyer* opinion itself recognized that a spirit of fairness is inherent in personal jurisdiction,[40] and that fairness must therefore be the goal of any formula employed to test the legal sufficiency, constitutional or otherwise, of jurisdictional assertions.

Pennoyer's understanding of personal jurisdiction and its vision of the primary objective of a legal sufficiency test are reiterated in the numerous opinions handed down in the years between *Pennoyer* and *International Shoe*. Further, these features of *Pennoyer* find expression in case after case decided under the modern constitutional sufficiency tests: minimum contacts, and fair play and substantial justice.[41]

A third observation about the power theory concerns the degree of deference it gives to state borders. If the power theory is as flexible as I claim, what is to be made of the strong deference to state territoriality packed into the theory's statement? This aspect of the power theory serves to remind us that territoriality is the *sine qua non* of a state's sovereignty and that state sovereignty cannot be ignored in deciding jurisdictional questions. Without at least the initial authority to exert power over persons or property within its borders, a state would simply cease to exist. And without the existence of states, the concept of personal jurisdiction at the state level would make no sense. Hence, the state's interest in the litigation must always be taken seriously when a court

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36. *Id.* at 723.

37. *Id.* at 735.

38. *Id.* at 731.

39. *Id.* at 733. One exception cited by the Court is the ability of a state to prescribe the conditions upon which a marriage relationship may be dissolved, notwithstanding the absence of one of the partners from the territory of the state. *Id.* at 734-35. *See also* Cox, *supra* note 5, 559-61 (arguing that a divorce affects the absent spouse not a fictitious *res* called the marriage).

40. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV. 1015, 1029 (1983). The author asserts that a concern for fairness to the defendant underlies *Pennoyer's* famous dictum that the Fourteenth Amendment serves as the basis for directly challenging personal jurisdiction. For a contrasting view, *see* Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 504 (1987) (''First and most basically, the focus is not on concerns about fairness to the particular defendant, but instead is on the inherent limitations on the power of governments'').

41. *Id.* at 508.

decides whether the exercise of personal jurisdiction is legally sufficient.[42]

This admonition is easy to forget when applying the modern constitutional sufficiency test, because of the fuzzy language in which it is formulated. Indeed, the Court has made it a point to re-insert state sovereignty in the mix of factors to be considered under the rubric of minimum contacts or fair play and substantial justice. Thus, in *McGee v. International Life Ins. Co.*,[43] which was decided in the decade after the Court announced the minimum contacts theory in *International Shoe*, the Court held that the forum state's interest in the litigation is a relevant factor.[44] One year later in *Hanson v. Denckla*,[45] the Court stated that "[t]he basis of . . . [*in rem*] jurisdiction is the presence of the subject property within the *territorial* jurisdiction of the forum state."[46] *Kulko v. Superior Court*,[47] *World-Wide Volkswagen Corp. v. Woodson*,[48] and *Burger King* pointed to "the shared interest of the several States in furthering fundamental substantive social policies."[49] And *Burnham*, of course, upheld presence, or transient, jurisdiction, which falls squarely within the first prong of the power theory.[50]

In short, with all its limitations and exceptions, *Pennoyer*'s power theory may not be the best expression of a general theory of state court personal jurisdiction.[51] Minimum contacts and fair play and substantial justice, especially the latter, may provide better, more comprehensive statements. Yet *Pennoyer*'s understanding that fairness (rather than state sovereignty or some other consideration) is the core concern of personal jurisdiction and that the primary objective of any constitutional sufficiency test is to promote fairness remains the dominant force in personal jurisdiction decisionmaking even today.[52]

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42. The state's interest, or state sovereignty, is most often at stake in *in rem* cases. See *supra* cases cited in notes 15 and 34. *See also* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271-72 (1917) ("The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner").

43. 355 U.S. 220 (1957).

44. *Id.* at 223.

45. 357 U.S. 235 (1958).

46. *Id.* at 246 (emphasis supplied).

47. 436 U.S. 84 (1978).

48. 444 U.S. 286 (1980).

49. *World-Wide Volkswagen*, 444 U.S. at 292 (citing *Kulko*, 436 U.S. at 98); *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

50. *See supra* text accompanying notes 30-31. *See also* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113 (1987) (assessing interest of plaintiff and forum state, California, in determining whether minimum contacts existed).

51. For an excellent critique of *Pennoyer*, see Geoffrey Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241. *See also*, Reynolds, *supra* note 25 (describing the formalist territorial paradigm of *Pennoyer* as socially regressive and inept).

52. *See* Terry S. Kogan, *A Neo Federalist Tale of Personal Jurisdiction*, 63 S.

The final observation I shall make about *Pennoyer* relates to the fairness of its decision rather than to its statement regarding the power theory. Because the decision turned on the issue of notice, specifically whether publication is a proper method of service in an *in personam* action, one cannot assess the fairness of the decision from the standpoint of personal or bases jurisdiction, which is the focus of this article. On the issue of notice, it is obvious that the decision to invalidate the default judgment rendered in Mitchell's *in personam* action against Neff is a fair decision. Publication is the weakest form of notice in terms of its ability to apprise a party of the pendency of the action and afford her an opportunity to be heard.[53] In Mitchell's lawsuit and in the subsequent sheriff's sale, Neff stood to lose land valued at $15,000 on a mere $300 claim. Neff's interest in receiving notice of the action was paramount under these circumstances.

Although the Court's reasoning that notice in *in personam* cases must be effectuated through personal service is more formalistic than interest analysis would allow, it is difficult to believe that the Court did not think about the consequences of its decision before rendering it. Thus, fairness may be the driving force behind notice jurisdiction as well as personal jurisdiction.[54] As Holmes said: "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."[55]

B. Hess v. Pawlaski[56]

In this case, a state statute subjected a nonresident motorist to limited *in personam* jurisdiction within the state by appointing, on behalf of such motorist, the registrar, or Secretary of State, as agent for service of process.[57] *In personam* jurisdiction was limited to any accident or collision growing out of the operation or the use of an automobile by

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CAL. L. REV. 257, 358-71 (1990) (setting forth three paradigms of personal jurisdiction growing out of *International Shoe*; one urges that *Pennoyer* was correct to focus on interstate sovereignty, the other two view fairness in a reciprocity sense and in a mutual inconvenience sense, respectively).

53. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (publication deemed an unreliable means of giving notice in most instances).

54. *See generally* Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane case*, 100 U. PA. L. REV. 305, 319 (1951) ("Fairness to both parties is becoming the major consideration in determining if a court has jurisdiction. . . .").

55. Holmes, *supra* note 16, at 466.

56. 274 U.S. 352 (1927).

57. In addition, the plaintiff was required to send notice of such service to the defendant via registered mail, and to attach the return receipt along with an affidavit of compliance to the writ. *Id.*

the nonresident in the forum state.[58] In a unanimous opinion, the Supreme Court upheld this statute under the Fourteenth Amendment Due Process Clause.

Hess is the cornerstone of a hodgepodge of cases that have been subsumed under the nondescriptive legal fiction of "implied consent."[59] The jurisdictional theory that ties these cases together is said to be that the nonresident has committed some act within the state, such as, driving a motor vehicle, selling securities, or selling insurance, from which a state statute secures his or her consent.[60] Indeed, the statute in *Hess* began with the following words:

> The acceptance by a nonresident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, . . . shall be deemed equivalent to an appointment by such nonresident of the registrar . . . to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved while operating a motor vehicle . . . .[61]

However, in *Olberding v. Illinois Central Railroad Co.*,[62] the Supreme Court took issue with the fiction of implied consent. Speaking for the Court, Justice Frankfurter said:

> This is a horse soon curried. . . . It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has "impliedly" consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all . . . . The defendant may protest to high heaven his unwillingness to be sued and it avails him not.[63]

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58. *Id.* at 353-54.

59. *See, e.g.*, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935) (upholding Iowa's assertion of jurisdiction on a nonresident selling securities in Iowa based on a dispute generated by those sales); McGee v. International Life Ins. Co., 355 U.S. 200 (1957) (upholding California's assertion of jurisdiction on a nonresident insurance company based on a dispute arising out of a single insurance policy sold to a California resident).

60. *See, e.g.*, JOHNATHAN LANDERS AND JAMES MARTIN, CIVIL PROCEDURE 69 (1981); STEPHEN YEAZELL, JOHNATHAN LANDERS & JAMES MARTIN, CIVIL PROCEDURE 72-73 (3d ed. 1992).

61. 274 U.S. at 354. *See also id.* at 356 ("Under the statute the implied consent . . . .").

62. 346 U.S. 338 (1953).

63. *Id.* at 340-41 (jurisdiction over the defendant in *Olberding* was asserted under a non-resident motorist statute).

Justice Frankfurter's reading of *Hess* is in accord with Justice Holmes's dictum that "[t]he Constitution is not to be satisfied with a fiction."[64]

Although the Massachusetts legislature may have had an implied consent rationale in mind when it enacted the statute in *Hess*,[65] the Supreme Court sought to provide a different rationale, one that could address the fairness issue. Specifically, the Court stated that "[m]otor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property."[66] Based upon these considerations, the Court concluded that the exercise of jurisdiction was fair and, hence, constitutional.

Using interest analysis, one would ineluctably reach the same conclusion. Interest analysis focuses on the competing interests, or fairness factors, in the litigation. The most obvious, and perhaps most important, interest in *Hess* is that of the state. It is the desire of the state to augment the inducements the nonresident may or may not have to conduct her inherently dangerous or risk-creating in-state activities in compliance with the state law regulating such activities. This is a legitimate state interest. It is well within the state's police powers to induce the nonresident, who has little or no ties with the community, to do his very best to avoid injury to others (namely, residents) with whom he deals in connection with the regulated activity.[67] By bringing the nonresident within the reach of the state's judicial process, the nonresident is thereby encouraged to comply with the applicable state substantive law.

Augmenting the inducement to comply with the substantive law is not only a legitimate state interest, but it also points to a fundamental relationship between procedure and the substantive law. Hepburn reminds us that procedure is part of the adjective law, and "[a]s its name 'adjective' imports, it exists for the sake of something else—for the sake of the 'substantive' law."[68] James and Hazard strike a similar note: "The law of procedure provides a mechanism by which authority of the state, and its coercive powers, can be brought to bear on a carefully examined basis to secure compliance with the law when these inducements fail."[69]

Although augmenting compliance with the substantive law falls within the scope of the fundamental relationship between procedure and the

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64. Hyde v. United States, 225 U.S. 347, 390 (1912).

65. *See supra* text accompanying note 61.

66. *Hess*, 274 U.S. at 356.

67. Individuals have the right to "life, liberty and property," and states have authority to preserve such life, liberty, and property through the exercise of their implied powers. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 554 (1988).

68. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING 19, 20 (1897).

69. FLEMING JAMES, JR. AND GEOFFREY HAZARD, JR., CIVIL PROCEDURE 2 (3rd ed. 1985).

substantive law, it does not by itself provide a constitutionally sufficient reason for the exercise of *in personam* jurisdiction over any nonresident who happens to have dealings within the forum state. Most of the myriad of so-called implied consent cases seem to have the following common features, which suggest that the jurisdictional base that arises from these cases is quite limited.

First, the in-state activity must be of a certain quality—inherently dangerous or risk-creating. Typically, this type of activity has two features: No amount of skill or care can remove the danger inherent in the activity;[70] and the activity is "subject[] . . . to special regulation" in the sense that "neither . . . citizens nor nonresidents could freely engage" in it.[71] Driving a motor vehicle,[72] selling securities,[73] and selling insurance[74] are exceptional activities because the potential for danger (in these instances physical or financial) cannot be eliminated by skillful or careful conduct. And because of the risk-creating quality of these activities, they are subject to such heavy regulation that an owner's or operator's license is required of both residents and nonresidents.[75]

The second feature common to most of the so-called implied consent cases is that the cause of action on which the plaintiff sues must arise out of the regulated, in-state activity.[76] This, then, is a discrete jurisdictional base. The scope of suability is limited rather than plenary, sometimes called "limited jurisdiction" or "specific jurisdiction."[77]

In addition to augmenting the nonresident's inducement to comply with the substantive law—what might be called a "preventative" interest or policy—the state has another important interest inherent in the implied consent factual pattern. This interest might be called a "remedial" interest or a "day-in-court" policy. It is an interest or policy of providing residents with access to a convenient forum. As the Court said in *McGee*, an insurance case: "California [the forum state] has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims."[78]

The state's remedial interest can also be viewed as the plaintiff's interest. In *Olberding*, Justice Frankfurter actually claimed this interest

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70. *See supra* text accompanying note 66.

71. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627-28 (1935).

72. *Hess*, 274 U.S. at 356.

73. *Doherty*, 294 U.S. at 627 (1935).

74. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

75. *Doherty*, 294 U.S. at 627 (selling securities); *Hess*, 274 U.S. 352 (driving a motor vehicle); *McGee*, 355 U.S. 220 (selling insurance).

76. *Hess*, 274 U.S. at 356; *Doherty*, 294 U.S. at 623; *McGee*, 355 U.S. at 223.

77. "Specific jurisdiction" is to be distinguished from "general jurisdiction." *See infra* note 85 and accompanying text.

78. *McGee*, 355 U.S. at 223.

for the plaintiff. "The potentialities of damage by a motorist, in a population as mobile as ours, are such that those whom he injures must have opportunities of redress against him . . . ."[79]

In short, the state's interest in the so-called implied consent cases is manifested in two ways. First is the preventative policy of augmenting the nonresident's inducement to comply with the substantive law regulating his or her risk-creating activity. Second is the remedial policy of providing a convenient forum, a day in court, for residents injured by such risk-creating activity. Plaintiff also has a day-in-court interest at stake.

Under interest analysis, these interests must be balanced against the interest of the nonresident defendant. In this context, the nonresident defendant's interest may be stated as an interest in having an opportunity to be heard in a convenient forum, which is usually a forum in its state of residence.[80] Given the weight of the preventative and remedial policies, it is usually fairer for the nonresident to travel than for the resident. Clearly, the nonresident is inconvenienced, "but certainly nothing which amounts to a denial of due process."[81]

For Justice Frankfurter, the plaintiff's interest was paramount. It alone was sufficient to tip the scale in favor of the forum state's exercise of *in personam* jurisdiction. Underscoring the fact that fairness is the *sine qua non* of personal jurisdiction, he stated the following: "We have held that this is a fair rule of law as between a resident injured party (for whose protection these statutes are primarily intended) and a nonresident motorist, and that the requirements of due process are therefore met."[82]

C. *Tauza v. Susquehanna Coal Co.*[83]

Although not a Supreme Court case, *Tauza* is an important case on personal jurisdiction. Many judges have adopted its understanding of the "doing business," or "corporate presence," jurisdictional base because of the cogency of its opinion written by Judge Cardozo, who later replaced Justice Holmes on the Supreme Court.

In *Tauza*, the defendant was an out-of-state corporation that engaged in certain activities within the forum state. Primarily, the defendant solicited business within the forum state and shipped its product (coal) into the forum state on a continuous basis. In addition, it maintained

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79. *Olberding*, 346 U.S. at 341. *See also supra* text accompanying note 66.
80. *See Olberding*, 346 U.S. at 341; *McGee*, 355 U.S. at 224.
81. *McGee*, 355 U.S. at 224.
82. *Olberding*, 346 U.S. at 341.
83. 115 N.E. 915 (N.Y. 1917).

an office in the forum state. Judge Cardozo held that these in-state activities were sufficient to constitute "doing business" within the forum state and that as such the defendant could be sued upon a cause of action that "has no relation in its origin to the business here transacted."[84] Thus, unlike the so-called implied consent cases, the defendant in a doing business case was subject to plenary liability, sometimes called "general jurisdiction."[85]

Tauza gives content to the concept of doing business, or corporate presence, that the Supreme Court adopted in *Philadelphia and Reading Railway v. McKibbin*.[86] In *McKibbin*, Justice Brandeis, speaking for the Court, ruled that: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."[87] Judge Cardozo held that continuous solicitation, shipments, and the maintenance of an office within the forum state were sufficient to give a foreign corporation a jurisdictional presence within the forum state.[88]

This is not, however, a universal rule. Other courts, including the Supreme Court, have found corporate presence to exist on the basis of fewer in-state activities, such as the mere continuous solicitation of orders by sales agents.[89] Judge Hand put it best. After reviewing a number of doing business cases at both the Supreme Court and lower court levels, he concluded: "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass."[90]

Thus, it appears that the doing business, or corporate presence, jurisdictional base is but a legal fiction. Like implied consent, it subsumes a heterogeneous mixture of factual patterns under a single rubric. And, like implied consent, future decisions are difficult to predict, requiring courts to "step from tuft to tuft across the morass."[91]

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84. *Id.* at 918.

85. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984). *See generally* Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). Some scholars argue for a restrictive application of general jurisdiction because of its "dispute-blind" character; Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Mary Twitchell, *A Rejoinder to Professor Brilmayer*, 101 HARV. L. REV. 1465 (1988). Others are comfortable with a more liberal application of the doctrine; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444 (1988).

86. 243 U.S. 264 (1917).

87. *Id.* at 265.

88. *Tauza*, 115 N.E. at 917-18.

89. International Harvester Co. v. Kentucky, 234 U.S. 579 (1941). *See McKibbin*, 243 U.S. 264.

90. *Hutchinson*, 45 F.2d at 142.

91. *Id.*

But the decisions are not without some essential direction. As Judge Hand recognized,[92] they can be read as an attempt to determine whether it is fairer for the plaintiff or the defendant to travel. This can be seen clearly through the prism of interest analysis.

The primary interests at stake in most of the doing business cases are the convenience interests of plaintiff and defendant.[93] Other interests, including the state's interest, usually are not relevant. Whatever the precise nature of the defendant's in-state activities in these cases, they typically have a common factual pattern. "They are made," to use Judge Cardozo's words, "not on isolated occasions, but as part of an established course of business . . . . [They are conducted] not casually and occasionally, but systematically and regularly."[94] Given this fact, it can hardly be argued that it is too inconvenient for the nonresident defendant to answer for its alleged wrongful conduct in the forum state.[95] Indeed, the defendant is more like a resident than a nonresident because, given the continuous and systematic quality of its in-state activities, it receives fire and police protection, municipal services, and other privileges and benefits from the forum state on an on-going basis. Thus, if a resident can be subjected to general jurisdiction, so can the defendant doing business in the forum state.

This point is made clearer by comparing "doing business" with "implied consent." The defendant's in-state activities under the latter jurisdictional base are perhaps part of a single transaction but, more importantly, they are inherently dangerous.[96] There is, therefore, no reason to expand the defendant's suability beyond the scope of its in-state activities. In contrast, the defendant doing business in the forum state has a greater or broader presence, more permanent in nature. It is therefore reasonable to expand the defendant's suability beyond the range of its in-state activities.[97]

D. International Shoe Co. v. State of Washington[98]

If analyzed under *Pennoyer*'s power theory, *International Shoe* would line up as a "doing business" case. The Court, instead, analyzed the

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92. *See supra* note 19.

93. *See* Kogan, *supra* note 52, at 367-71 (discussing "The Mutual Inconvenience Paradigm of Personal Jurisdiction").

94. *Tauza*, 115 N.E. at 917.

95. *Id.* at 918.

96. *See supra* text accompanying note 66.

97. *But see* COUND ET AL, CIVIL PROCEDURE 81 (5th ed. 1989) (the application of either the "consent" or "presence" doctrine by the Court was difficult because "whichever was chosen it became necessary to determine whether the foreign corporation was 'doing business' within the state, either to decide whether its 'consent' could properly be 'implied,' or to discover whether the corporation was 'present.'").

98. 326 U.S. 310 (1945).

case under a different constitutional sufficiency test—minimum contacts.[99] Yet, the result in the case would probably be the same regardless of which test was employed, because fairness dictated that the defendant, International Shoe, should have traveled.

The State of Washington brought suit against International Shoe, a foreign corporation, to recover unpaid contributions to the state unemployment compensation fund. International Shoe's in-state activities consisted of continuous solicitation of shoe orders and shipments of shoes to customers who were, for the most part, residents of the state. There was no office; the salesmen rented rooms for sample displays occasionally. The employees of International Shoe were residents of the forum state. Plaintiff's cause of action related to these in-state activities.[100]

After finding that International Shoe's in-state activities "were systematic and continuous throughout the years in question,"[101] the Court concluded that International Shoe "received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights."[102] On this basis the Court ruled that the exercise of jurisdiction satisfied the minimum contacts standard.

Significantly, the aspects of *International Shoe* that the Court found compelling were essentially the same as those in the "doing business" cases. Generally, the Court looked for systematic and continuous in-state activities and discovered them, although International Shoe's in-state activities were fewer than those of the defendant in *Tauza* (for example, International Shoe had no office within the forum state). Once the Court found this magic factual pattern, it was able to conclude that the defendant was receiving privileges and benefits from the forum state on a regular basis. Thus, the exercise of jurisdiction was consistent with the power theory, minimum contacts, and, indeed, fairness.

One comes to the same conclusion more directly using interest analysis. Although the interest of the defendant, International Shoe, argued against the exercise of jurisdiction, the interests of the plaintiff, the state in this instance, argued in favor of the exercise of jurisdiction. The defendant's interest was in avoiding inconvenient litigation. Given

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99. *See supra* text accompanying note 13.

100. 326 U.S. at 311-14.

101. *Id.* at 320.

102. *Id.* The Court applied a *quid pro quo* rationale:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319.

the fact that the defendant was in the forum state on a continuous and systematic basis, it was reasonable to conclude that litigation there would not unduly inconvenience the defendant. The defendant was already in the forum state; that fact alone vitiated its claim of inconvenience.

On the other side of the scale, the plaintiff/state's interest was valid and quite substantial. To deny the state the power to sue a nonresident employer locally for collection of the unemployment compensation tax would increase the state's cost of maintaining the unemployment compensation fund. State attorneys would have to litigate the collection question in many different jurisdictions, because other nonresident employers would follow the defendant's actions if the defendant were successful. This could result in substantial cost and could possibly lead to inconsistent judicial determinations. The increased operating cost of the fund would ultimately be passed on to the residents of the state of Washington. The plaintiff/state, then, had a strong interest in maintaining the fiscal integrity of its unemployment compensation fund, a fund whose importance was demonstrated many times during 1937-1940, as the country began to move out of the Great Depression.

The fact that the plaintiff/state's cause of action was discreet also suggested that it was fairer for the defendant to travel than for the representatives of the plaintiff/state to travel. This was not a case of general jurisdiction; rather, it was a case of specific jurisdiction, which added to the fairness of exercising jurisdiction in the forum state.[103]

E. Harris v. Balk[104] *and Shaffer v. Heitner*[105]

Harris v. Balk validates a type of *quasi-in-rem* jurisdiction in which the plaintiff seeks to determine a personal claim that is unrelated and antecedent to the attachment of property located within the forum state. The property is used both as a basis for jurisdiction and as a means of paying the claim in whole or in part. Three-quarters of a century after *Harris v. Balk*, the Supreme Court rejected this type of *quasi-in-rem* proceeding in *Shaffer v. Heitner*. *Shaffer* was decided under *International Shoe*'s minimum contacts theory.[106] However, by applying interest analysis, it is possible to understand how *Harris* was correctly decided at the time it came before the Supreme Court, and how its form of *quasi-in-rem* jurisdiction could *still* be upheld today in a manner consistent with *Shaffer* and fairness.

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103. *See supra* text accompanying notes 75-77.
104. 198 U.S. 215 (1905).
105. 433 U.S. 186 (1977).
106. *See supra* text accompanying note 13 and text accompanying notes 98-102.

In *Harris v. Balk*, a $180 debt Harris owed to Balk, both of whom were residents of North Carolina, was attached pursuant to a Maryland statute by Epstein, Balk's creditor who was a resident of Maryland, while Harris was temporarily in Maryland on business. Harris paid over the debt to Epstein and was subsequently sued by Balk in a North Carolina court for nonpayment of the $180 debt. Harris sought to plead the Maryland garnishment proceedings as a bar to Balk's recovery, but the pleading was not accepted on the ground that the Maryland judgment was void for lack of jurisdiction. The North Carolina Supreme Court agreed, and Harris appealed to the United States Supreme Court.

On appeal, the Court reversed, holding the Maryland judgment invalid. The Court had to first decide whether the situs of a debt is either at the domicile of either the creditor or debtor or is nonexistent, clinging to the debtor and following her wherever she may go. The lower courts were not in harmony on this issue; the Court itself recognized that "they cannot be reconciled."[107] Once the Court decided that the Maryland judgment should be sustained, there was no doubt as to how it would decide this threshold issue. Debts, the Court ruled, "have no locus or situs, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere."[108]

This ruling placed the property (the debt) within Maryland, the forum state, at the time the *quasi-in-rem* action was commenced. For purposes of *quasi-in-rem* jurisdiction, the property must be deemed to be located within the forum state, but this consideration may not have been the driving force behind the ruling concerning the situs of debts.

The Court seems to have been motivated by two other considerations. First, if the Maryland judgment was not sustained, then Harris would have had to pay Balk the amount Harris paid Epstein. That would have been fundamentally unfair. As the Court said, "[i]t ought to be and it is the object of courts to prevent the payment of any debt twice over."[109] Second, because the case was litigated against the backdrop of the American industrial revolution, the Court may have been concerned with the nation's credit economy. Easy credit was essential to the nation's industrial development. If debt collection became difficult, credit could become less available or more costly. By ruling that a creditor can sue his debtor wherever the latter may be found, the Court may have been trying to make debt collection easier.

These considerations carry considerable weight within the framework of interest analysis. The first consideration, that Harris should not have

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107. *Harris*, 198 U.S. at 225.
108. *Id.* at 225 (quoting *Chicago, R.I. & P.R. Co. v. Sturm*, 174 U.S. 710 (1899)).
109. *Id.* at 226.

to pay twice, represented the plaintiff's interest. The second consideration concerned the public interest or the national interest, which was described as an "other relevant interest."[110] Both interests argued in favor of sustaining the validity of the Maryland judgment. Furthermore, there were no contraposed interests in the litigation. Balk had no real interest at stake because, as he admitted in court, "he did, at the time of the attachment proceeding, owe Epstein some $344,"[111] $180 of which was repaid through Harris. Thus, it was fairer to sustain the Maryland judgment than to overrule it.

There may, however, be cases in which the assertion of *quasi-in-rem* jurisdiction is unfair. *Shaffer v. Heitner* is one such case. In *Shaffer*, the owner of a single share of stock, a nonresident of the forum state, Delaware, sequestered stock in a corporation owned by officers and directors of the corporation, all of whom were nonresidents of the forum state. The corporation, Greyhound, had its principal place of business in Phoenix, Arizona, but its stock was deemed to be located in the forum state, its state of incorporation. The plaintiff sought to hold the defendants personally liable for a large judgment entered against the corporation in a private antitrust suit litigated in Oregon.

In holding that such *quasi-in-rem* jurisdiction was impermissible, the Court applied *International Shoe*'s minimum contacts test. Minimum contacts were lacking, the Court said, because the defendants "have simply had nothing to do with the State of Delaware."[112] There were no real ties, contacts, or relations between the defendants and the forum state. Consequently, the exercise of personal jurisdiction in this case violated constitutional due process.

Applying interest analysis, one would reach the identical conclusion. Although the plaintiff had an interest in having his claim litigated in a convenient forum, this was a weak interest in the context of the case. This plaintiff, unlike Epstein in *Harris v. Balk*, was a nonresident of the forum state and did not demonstrate that Delaware was otherwise a convenient forum. The forum state's interest in the litigation was also weak. True, Delaware may have an interest in augmenting the inducement of officers and directors of Delaware corporations to comply with the state substantive law regulating the fiduciary duties of corporate managers,[113] but the sequestration statute, which created *quasi-in-rem* jurisdiction in this case, failed to promote such a policy. The sequestration

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110. *See supra* text accompanying notes 20, 21. *See also* Abramson, *supra* note 22, at 465 (discussing "the shared interest of the several states in furthering fundamental substantive social policies.").

111. *Harris*, 198 U.S. at 228.

112. *Shaffer*, 433 U.S. at 216.

113. *See id.*

statute reached beyond corporate fiduciaries; it could be used against any nonresident who owned property, such as stock in a Delaware corporation, within the state. Jurisdiction under this statute was predicated not on a defendant's status as a corporate fiduciary, but on the mere presence of property within the state of Delaware.

Further, the lawsuit did not promote the public interest in a way similar to the *quasi-in-rem* action filed in *Harris v. Balk*. The role of *quasi-in-rem* jurisdiction as a means of preventing the evasion of debts, duties, or obligations was quite insignificant at the time of *Shaffer*. It was far easier under minimum contacts than under the power theory to obtain direct, *in personam* jurisdiction over a nonresident defendant. *International Shoe* expanded *in personam* jurisdiction.

Finally, the defendants' interest in avoiding litigation in Delaware was relatively substantial. The defendants did not purposefully direct a sufficient quantum of their activities toward the forum state such that they would have reasonably expected to litigate personal claims there. As the Court stated,

> [defendants] had no reason to expect to be haled before a Delaware court. Delaware, unlike some States, has not enacted a statute that treats acceptance of a directorship as consent to jurisdiction in the State. And "[i]t strains reason . . . to suggest that anyone buying securities in a corporation formed in Delaware 'impliedly consents' to subject himself to Delaware's . . . jurisdiction on any cause of action."[114]

Thus, it was fairer to make the plaintiff travel to a more appropriate forum to litigate his claim than to litigate it in Delaware.

In approaching *Shaffer* from the perspective of interest analysis, one can readily see that *quasi-in-rem* jurisdiction is not entirely dead. Indeed, the Court stated: "This case does not raise, and we therefore do not consider, the question whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[115] It is not difficult to imagine such a situation. No court today would invalidate the attachment of Iranian or Iraqi assets located in the United States by an American business person who seeks to satisfy an antecedent personal claim (e.g., the expropriation of plaintiff's business in Iran or Iraq) against these governments. It would simply be unconscionable to make the American travel to Iran or Iraq to litigate such a claim.

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114. *Id.* (footnotes omitted).
115. *Id.* at 211 n.37.

F. World-Wide Volkswagen Corp. v. Woodson[116]

Like *Shaffer*, the Supreme Court in *World-Wide Volkswagen* decided against the exercise of personal jurisdiction. *World-Wide Volkswagen* is, however, a more difficult case to decide on grounds of fairness.

In *World-Wide Volkswagen*, the plaintiffs, husband and wife, purchased a new Audi automobile from a retail dealer (Seaway) in New York. While traveling to their new home in Arizona the following year, the plaintiffs, who resided in New York, became involved in an accident in Oklahoma. Their Audi was struck in the rear by another automobile, causing a fire that severely burned the wife and her two children. Subsequently, the plaintiffs brought a products liability action in Oklahoma claiming that their injuries resulted from design defects in the Audi.

Named as defendants were Seaway, the regional distributor (World-Wide), the importer (Volkswagen), and the manufacturer (Audi). Only the retail dealer and the regional distributor entered special appearances to challenge the Oklahoma court's personal jurisdiction. Plaintiffs produced no evidence that either Seaway or World-Wide sold or shipped products into the forum state. "In fact, as . . . [plaintiffs'] counsel conceded at oral argument, . . . there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the exception of the vehicle involved in the present case."[117]

In ruling on the jurisdictional issue, the Court set forth the basic framework for the *Burger King-International Shoe* formula.[118] Once it is determined that the defendant has purposefully directed its activities toward the forum state such that the defendant could reasonably foresee the possibility of litigation there, the Court said, then the jurisdictional inquiry requires a balancing of various relevant interests and policies.[119] The Court ruled that neither Seaway's nor World-Wide's in-state activities were purposeful or foreseeable. Minimum contacts were lacking because the Audi was brought into the forum state by plaintiffs' voluntary act, rather than Seaway's or World-Wide's. Because the exercise of personal jurisdiction was unconstitutional for lack of minimum contacts, the Court did not have to apply the balancing test.[120]

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116. 444 U.S. 286 (1980).

117. *Id.* at 289.

118. *See supra* text accompanying notes 10-13 for a statement of this formula.

119. *See World-Wide*, 444 U.S. at 292. *See also supra* note 22, *infra* text accompanying notes 136-38.

120. *Burger King*, discussed next, is the Court's first attempt to apply the test, which it does under the rubric of "other factors" or "reasonableness." *See Burger King*, 471 U.S. at 476-78. *See also infra* text accompanying note 130.

Under interest analysis, however, *all* relevant interests are considered. Unlike the *Burger King-International Shoe* test, the plaintiff's interest and other relevant interests in the litigation must be considered when applying interest analysis even if minimum contacts or the defendant's ties to the forum state are lacking.

When analyzing *World-Wide Volkswagen* under interest analysis, consider the defendant's interest first. The absence of a deliberate affiliation with the forum state that would make litigation there foreseeable, as was arguably the situation in *World-Wide Volkswagen*,[121] may suggest that litigation within the forum state would inconvenience the nonresident defendant. However, inconvenience to the defendant does not by itself invalidate personal jurisdiction under interest analysis.

When the defendant's interest is balanced against the plaintiffs' interest and other relevant interests, the balance tips in favor of the exercise of personal jurisdiction in *World-Wide Volkswagen*. Plaintiffs' lawsuit was filed in Oklahoma while they were hospitalized in that state.[122] Thus, even though the plaintiffs did not reside in Oklahoma when the lawsuit was filed, Oklahoma was clearly the plaintiffs' most convenient forum. Given the severity of the plaintiffs' injuries, it would appear that the defendants were in the best condition to travel. To the extent one could conclude that the plaintiffs' and defendants' inconveniences were offsetting, another relevant interest—specifically the social goals of civil procedure—would seem to break the tie in plaintiffs' favor. Given that efficient litigation is a major procedural goal,[123] Oklahoma provided the best forum for efficient litigation, because the essential witnesses and critical evidence were located in Oklahoma.[124]

I disagree with Justice Brennan's argument that the state's interest is implicated in *World-Wide Volkswagen*. Justice Brennan argued that "[t]he State has a legitimate interest in enforcing its laws designed to keep its highway system safe."[125] If Justice Brennan was referring to the state's motor vehicle code, that reference was misplaced, because the defendants were not operating a motor vehicle in Oklahoma at the time of the accident. This was not a case like *Hess*.[126] If Justice Brennan had in mind Oklahoma's general tort law, the nexus between that law and Oklahoma highway safety was too unspecific or indirect to be

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121. Arguably, Seaway's and World-Wide's conscious participation in an interstate economic network establishes the foreseeability of litigation in Oklahoma. See *World-Wide Volkswagen*, 444 U.S. at 306 (Brennan, J dissenting).

122. *Id.* at 305 (Brennan, J. dissenting).

123. *See* FED. R. CIV. P. 1.

124. *World-Wide*, 444 U.S. at 305 (Brennan, J. dissenting).

125. *Id.*

126. *See supra* text accompanying notes 56-81.

meaningful. I do agree with Justice Brennan's conclusion that the exercise of personal jurisdiction in Oklahoma was fair under the totality of circumstances.

One wonders whether the Court would have reached a different result if neither the importer nor manufacturer remained as defendants in the litigation. The fact that plaintiffs could still have litigated in Oklahoma notwithstanding the Court's holding left the case somewhat immune from the charge of unfairness. Thus, as a practical matter, there was very little difference in terms of the outcome of the case and the outcome of interest analysis.[127]

G. Burger King Corporation v. Rudzewicz[128]

Burger King applied the balancing test ("other factors" or reasonableness test) broached in *World-Wide Volkswagen*.[129] The "little person" lost on the jurisdictional issue in *Burger King*, and that decision was fair.

The facts of the case are straightforward. Burger King, a Florida corporation that operates an extensive fast food franchise system, sued MacShara and Rudzewicz, residents of Michigan who opened a Burger King restaurant in Michigan, for breach of contract. Suit was brought in the Southern District of Florida on the basis of diversity subject matter jurisdiction. Personal jurisdiction was based on a provision of the Florida long-arm statute that reached causes of action arising from breach of contract. Burger King trained its franchisees and regulated their operations in detail. Regional offices supervised franchisees in their areas. The defendants' franchise contract was negotiated mainly with the district office but also with Miami headquarters. Shortly after the contract was signed, the franchise began to deteriorate. When rent payments fell behind, Burger King first negotiated and then sued. The defendants' challenge to personal jurisdiction was denied by the trial court. After trial, the district court ruled for Burger King on the merits, and the judgment was subsequently reversed by a divided appellate court on the ground that personal jurisdiction over defendant Rudzewicz (MacShara did not appeal his judgment) was improperly exercised by the Florida trial court.

In reversing the appellate court, the Supreme Court set forth the current framework for determining the constitutionality of personal jurisdiction: any assertion of personal jurisdiction must comport with traditional notions of "fair play and substantial justice." This means

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127. *See World-Wide*, 444 U.S. at 288 n.3.
128. 471 U.S. 462 (1985).
129. *See supra* note 119.

two things: (1) the defendant must purposefully establish minimum contacts with the forum state; and (2) the exercise of personal jurisdiction must be reasonable in light of other factors.[130] The Court elaborated on each test (or subtest) of the modern formula and then applied both tests to the facts of the case.

As to the minimum contacts test, the Court said: "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties or relations'."[131] Applying the minimum contacts test to the facts of this case, the Court specifically noted that the defendants had "no physical ties to Florida," save for "a brief training course in Miami. . . . Yet this franchise dispute grew directly out of 'a contract which had a *substantial* [and continuing] connection with the State.'"[132] The defendants reached out to negotiate with a Florida corporation and agreed by long-term contract to be regulated from Florida, to make payments to Florida, and to have disputes governed by the laws of Florida.[133]

Although choice-of-law considerations are generally irrelevant to jurisdictional analysis,[134] the Court indicated that a choice-of-law provision in a contract was relevant to minimum-contacts analysis. Such a provision can help to determine "whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes."[135] But, standing alone, such a provision "would be insufficient to confer jurisdiction."[136]

Moving to the reasonableness test broached in *World-Wide Volkswagen*,[137] the Court provided the following extended analysis, which is quite important:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the

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130. *Id.* at 471-78.

131. *Id.* at 471-72.

132. *Id.* at 479 (emphasis in original).

133. *Id.* at 479-81.

134. Hanson v. Denckla, 357 U.S. 235, 254 (1958).

135. *Burger King*, 471 U.S. at 481-82. Further insight into the Supreme Court's insistence on the defendant's foreseeability of being haled into the forum is found in Rush v. Savchuk, 444 U.S. 320, 329, 332 (1980) (holding that where the cause of action arose outside the forum and the defendant's only contact with the forum could not have "forewarned" him of the possibility of jurisdiction there, the forum state's interest in providing a forum for its resident is lacking).

136. 471 U.S. at 481-82.

137. *See supra* text accompanying note 119.

> assertion of personal jurisdiction would comport with "fair play and substantial justice." Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum state's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several states in furthering fundamental substantive social policies." These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional. For example, the potential clash of the forum's law with the "fundamental substantive social policies" of another state may be accommodated through application of the forum's choice-of-law rules. Similarly, a defendant claiming substantial inconvenience may seek a change of venue. Nevertheless, minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.[138]

Applying the reasonableness test to the facts of the case, the Court concluded that the exercise of personal jurisdiction was reasonable and, hence, constitutional.[139] Most important, the Court stated that there was no danger that allowing a franchisor to sue its franchisees in the former's home state would "sow the seeds of default judgments against franchisees owing smaller debts."[140] Given the absence of unreasonableness, the Court ruled that the exercise of personal jurisdiction in this case was fair.

A few observations need to be made about the important passage quoted above. First, the reasonableness test is essentially a balancing test that incorporates a variety of relevant interests, including the defendant's interest. This interest could be broad enough to encompass minimum contacts, and, to that extent, it may duplicate minimum-contacts analysis. Second, the Court makes it clear that the exercise of

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138. *Id.* at 476-78 (citations omitted).
139. *Id.* at 482-86.
140. *Id.* at 485-86.

personal jurisdiction may be unconstitutional even if minimum contacts can be established.[141] This strongly suggests that the reasonableness test may be the most important or even the decisive element of the fair play and substantial justice jurisdictional formula. Indeed, Justices Stevens, White, and Blackmun in *Asahi Metal Industry Co. Ltd. v. Superior Court of California*[142] invalidated jurisdiction on grounds of unreasonableness even though they believed that minimum contacts had been established.

Interest analysis is attentive to these observations. It assumes that the reasonableness test is determinative of jurisdictional questions and that the defendant's interest under the reasonableness test is broad enough to include the factors that would ordinarily come into play under minimum contacts analysis.[143] Thus, interest analysis consolidates the minimum contacts and reasonableness tests.[144]

It is difficult to see how interest analysis could yield a different result in the case. The interests of plaintiff Burger King and defendant Rudzewicz were the only major interests at stake in the litigation. They were both convenience interests. Litigation in Michigan or Florida would not have been "so gravely difficult and inconvenient" for either party.[145] Both parties were sophisticated and experienced in the business world.[146] It was, however, the quality and nature of Rudzewicz's in-state activities, particularly his reaching out to engage in a twenty-year business relationship with a Florida-based business, that most tipped the scale in favor of exercising jurisdiction. These activities were not random, isolated, or attenuated. Through his own initiative, a substantial connection with the forum state was created. The fact that plaintiff's cause of action was limited rather than plenary was also important because it specifically related to Rudzewicz's in-state activities. These considerations suggest that on balance it was fairer for Rudzewicz to travel to Florida than for Burger King to travel to Michigan.

H. Burnham v. Superior Court of California[147]

Our final case to revisit, *Burnham* harkens back to *Pennoyer v. Neff*.[148] In *Burnham*, a New Jersey resident was served with a summons and a divorce petition while temporarily in California on business and

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141. *See* Silberman, *supra* note 4, at 576-83 (discussion of problems that might result from the additional requirement of reasonableness).

142. 480 U.S. 102 (1987).

143. *See supra* text accompanying notes 130-33.

144. *See supra* text accompanying notes 22, 23.

145. The M.S. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

146. Rudzewicz is "the senior partner in a Detroit accounting firm." *Burger King*, 471 U.S. at 466.

147. 110 S. Ct. 2105 (1990).

148. *See supra* text accompanying notes 29-55.

to visit his children who were living with their mother, the defendant's wife. Defendant's motion to quash service was denied by the trial court and that decision was affirmed by the California Court of Appeals and the California Supreme Court.

The United States Supreme Court affirmed unanimously, but many scholars argue that its plurality opinion adds confusion to jurisdictional analysis.[149] This is because a majority of the Justices ignored the *Burger King-International Shoe* analytical framework, which had been in existence since at least *World-Wide Volkswagen*.[150] Four Justices (Chief Justice Rehnquist and Justices Scalia, the author of the opinion, White, and Kennedy) held that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"[151] Although the reference to fair play and substantial justice may make it appear that Justice Scalia's analysis is within the *Burger King-International Shoe* conceptual scheme, Justice Scalia believed that the presence, or transient, jurisdictional base need not be subjected to *International Shoe*'s minimum-contacts analysis. "*International Shoe* confined its 'minimum contacts' requirement to situations in which the defendant 'be not present within the territory of the forum. . . .'"[152]

Justice Scalia, then, believed that presence jurisdiction, being a traditional rule of jurisdiction, is *ipso facto* fair or constitutional and, hence, was exempt from the application of both *International Shoe*'s minimum contacts test and *Burger King-International Shoe*'s two-pronged minimum contacts and reasonableness test.[153] Clearly, this view of jurisdictional analysis conflicts with *Shaffer v. Heitner*'s command that "*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[154]

Justice White concurred in much of Justice Scalia's opinion. Significantly, however, he did not join in the view that *Shaffer*'s command or *International Shoe*'s analysis was inapplicable to presence jurisdic-

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149. *See, e.g.*, Redish, *supra* note 4; Stein, *supra* note 4.

150. *See supra* text accompanying notes 117-19.

151. *Burnham*, 110 S. Ct. at 2115.

152. *Id.* at 2116 (citing *International Shoe*, 326 U.S. at 316). In addition, Scalia specifically relies on historical validity to meet the *International Shoe* standard, stating: "[] a doctrine that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard." *Burnham* at 2116-17.

153. For an excellent discussion and critique of Scalia's opinion *see*, Cox, *supra* note 5, at 537-47.

154. 433 U.S. at 212 (emphasis added). *See also* Cox, *supra* note 5, at 539-41 (discussing specifically Scalia's opinion in reference to *Shaffer*).

tion,[155] leaving only three Justices holding to that part of Justice Scalia's opinion. Citing *Shaffer*, Justice White stated that ". . . the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid. . . ."[156] Justice White concurred in the judgment because his examination of the presence jurisdiction rule led him to conclude that the rule, either as applied in this case or as a general proposition, was not so arbitrary and lacking in common sense that it should be held to be violative of the Constitution.[157] Thus, for Justice White, presence jurisdiction was virtually impervious to constitutional challenge. Indeed, he went on to expressly state that "until . . . a showing [of general arbitrariness or unfairness] is made, which would be difficult indeed, claims in individual cases that the rule would operate unfairly as applied to the particular non-resident involved need not be entertained."[158]

Justice Stevens also concurred in the judgment. He wrote separately only to state that Justices Scalia's and Brennan's opinions were too broad to join in, and that this was "a very easy case" to decide.[159]

Justice Brennan wrote a concurring opinion in which Justices Marshall, Blackmun, and O'Connor joined. This opinion is distinguishable from the others in that it is the only opinion that attempted to apply the *Burger King-International Shoe* test.[160] Justice Brennan stated that minimum contacts existed because the transient defendant "knowingly assume[s] some risk that the State will exercise its power over my property or my person."[161] Justice Brennan also believed that the exercise of presence, or transient, jurisdiction was reasonable because the transient defendant availed herself of significant benefits, such as, police and fire protection and free travel on state roads and waterways, provided by the state.[162] In addition, the burden placed on a transient defendant was slight, because modern modes of transportation and communications have made it "much less burdensome" for a party to defend herself outside her state of residence.[163]

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155. *Burnham*, 110 S. Ct. at 2109, 2119-20.

156. *Id.* at 2119.

157. *Id.* at 2120.

158. *Id.*

159. *Id.* at 2126. *But see* Silberman, *supra* note 4, at 573 (maintaining that general jurisdiction rules are necessary and require clear, identifiable standards based on power and sovereignty rationales).

160. *See* Stein, *supra* note 4, at 604-06 ("Brennan's concurrence does attempt to apply the general conceptual framework set out in earlier personal jurisdiction cases.").

161. *Id.* at 2124.

162. *Id.* at 2124-25.

163. *Id.* at 2125.

Whether presence jurisdiction establishes sufficient contacts, ties, or relations between the defendant and the forum state to satisfy the minimum-contacts requirement is open to serious question.[164] Certainly, the jurisdictional contacts under presence jurisdiction are of a more ephemeral quality than those under other traditional jurisdictional bases.[165] Moreover, to say that the transient defendant "knowingly assume[s] some risk that the State will exercise its power over" her person[166] comes very close to establishing a new legal fiction. This language seems fictive because, in point of fact, the transient defendant in *Burnham* did not *knowingly* assume a litigation risk by merely entering the forum state. Justice Brennan's reasoning is at variance with the facts in *Burnham*.[167] Indeed, the jurisdictional status of the transient defendant in this case was strikingly similar to that of the defendant in an "implied consent" case. To borrow from Justice Frankfurter, the transient defendant "may protest to high heaven his . . . [lack of intent to assume a litigation risk] and it avails him not."[168] Lest we forget, the Court long ago rejected the use of legal fictions as a substitute for substantive jurisdictional analysis.[169] Such use of legal fictions may also be constitutionally suspect.[170]

This is not to suggest that the result in *Burnham* was wrong, or unfair. The result would be the same if interest analysis were applied, but the fairness of the decision would be brought into sharper focus.[171] Unlike Justice Brennan's application of the *Burger King-International Shoe* test, interest analysis would not focus on only one interest in the litigation. Justice Brennan's jurisdictional analysis in *Burnham* dealt primarily with the defendant's interest or ties to the forum state.[172] Interest analysis necessarily looks at all the relevant interests in the litigation.

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164. *See* Cox, *supra* note 5, at 517 (arguing that transient jurisdiction is unconstitutional).

165. *See supra* text accompanying notes 56-97.

166. Justice Brennan argued: "[t]hat the defendant has already journeyed at least once before to the forum - as evidenced by the fact that he was served with process there - is an indication that suit in the forum likely would not be prohibitively inconvenient." *Burnham* at 2125. *See also supra* text accompanying note 161.

167. *See* Stein, *supra* note 4, at 604-06.

168. *See supra* text accompanying note 63.

169. *See supra* note 26 and accompanying text. Justice Brennan himself has recognized this fact. *See Burger King*, 471 U.S. at 479 (citing *International Shoe*, 326 U.S. at 319).

170. See *supra* text accompanying notes 58-64.

171. *See* Reynolds, *supra* note 25, n.279 (stating that "[i]n *Burnham*, California had a legitimate need to exercise jurisdiction over the defendant, and the defendant had sufficient relationships to justify the exercise of jurisdiction without the invocation of the transient jurisdiction concept.").

172. *See supra* text accompanying notes 159-63.

Although the forum state may have an interest in providing a convenient forum for one of its citizens seeking a divorce, the strongest interest in favor of the exercise of jurisdiction in *Burnham* may have been that of the plaintiff. State courts have a monopoly on marriage dissolution. Thus, the plaintiff was locked into the judicial system; her problem could only be resolved by resort to the courts. Additionally, as a single mother, the plaintiff was hardly in a position to travel across country to New Jersey to sue for divorce. Such an expedition could have been quite burdensome because it might have caused major disruptions in her family and work.

In contrast, the potential burden on the defendant in this case was relatively slight. The defendant had reasons to return to the forum—children and business. In any event, he seemed less encumbered by family or work to travel than did the plaintiff. Also, shortly before the plaintiff departed for California, the defendant did in fact agree that the plaintiff would file for divorce on grounds of irreconcilable differences.[173] When plaintiff failed to file in New Jersey, the defendant should have reasonably anticipated that she would file in California, her new state of residence.[174]

The public also had an interest in the litigation. However, this interest argued against the exercise of jurisdiction in California. Knowing that she will be subject to *general* liability in a distant state, a divorced parent may be disinclined to visit her children frequently if at all. This goes against society's interest in promoting strong family values.

Two considerations may counter this concern. First, arguably a parent would not allow the threat of being sued to stand between him and his children. This, of course, depends on the seriousness of the litigation lurking in the background. Second, interest analysis would limit the jurisdictional ruling to the facts of the case. Unlike Justice Scalia's opinion in *Burnham*, an opinion based on interest analysis would reject any talismanic formulas; "the facts in each case must [always] be weighed" in determining whether the exercise of jurisdiction is fair.[175] Indeed, *International Shoe* in spirit and in words calls for such ad hoc jurisdictional decisionmaking: "Whether Due Process is satisfied must depend [not on a mechanical or quantitative analysis, but] rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the Due Process Clause to insure."[176]

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173. *Burnham*, 110 S. Ct. at 2109.

174. *But see* Silberman, *supra* note 4, at 595 (arguing that it may be unfair for California to assert jurisdiction over this defendant considering that the wife and children are "newly arrived" and the defendant has little or no relationship with that state and its marriage/divorce regulatory rules).

175. Kulko v. California Sup. Ct., 436 U.S. 84, 92 (1978).

176. *International Shoe*, 326 U.S. at 319.

III. Conclusion

In this Article, I have examined a number of Supreme Court cases to support my thesis that, in spite of its uncertainty, personal jurisdiction law has an essential purpose and analytical structure. The basic goal of personal jurisdiction law is to determine in each case whether it is fairer for the plaintiff or the defendant to travel.[177] This determination is made through a policy-oriented approach in which courts identify and balance all the relevant interests, or policies, in the litigation. Using this conceptual scheme, the results of future cases cannot be predicted; each case must be judged individually on its own merits to achieve a fair result.

The Court does not always indicate that it is engaging in a balancing test when it decides jurisdictional questions. However, given the Court's clear and overriding desire to reach a fair result in these cases, I believe the Justices are in fact, without knowing or acknowledging it, engaging in interest analysis, or something close to it, in every case. The power theory, minimum contacts, fair play and substantial justice, and even Justice Scalia's historical evidence and consensus test necessitate some degree of balancing of contraposed interests. Certainly this is so with respect to the cases reviewed in this article.[178] Even the decision in *World-Wide Volkswagen*, which is backed by an opinion that involves less discussion of competing interests than interests analysis commands,[179] does not "sacrifice good sense to a syllogism." As a practical matter, the outcome of the case is fair because at least one and possibly two deep pockets remained in the case after dismissal.[180] It is difficult to believe that this critical fact went unnoticed when the Justices considered the case.

Scholars may wish to criticize personal jurisdiction law for its unpredictability. But let us hope that good sense will continue to triumph over ritual in the Court's jurisdictional decisionmaking, even if the outcome of future cases remains unpredictable. Unpredictability is not too high a price to pay for fairness.

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177. *See supra* note 19 and accompanying text.

178. As Oliver Wendell Holmes stated, ". . . the law is administered by able and experienced men [and women], who know too much to sacrifice good sense to a syllogism, . . . when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them. . ." Oliver W. Holmes, The Common Law 36 (1881).

179. *See supra* text accompanying notes 119-24.

180. *See World-Wide Volkswagen*, 444 U.S. at 288, n.3.

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NOTES

Changing Sexual Assault Law and the Hmong

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The best way to get married is for the boy to come to your house and ask your mother and father. But I knew that if [my boyfriend] Xao did that, my parents would say, "No." So that was a problem and I had not decided what to do.

Every night I had to go outside to get wood and water for the morning. One night I went out to get the wood, and found Xao waiting for me with his two friends. . . .

Xao didn't say anything. His friends said, "We want to take you to marry him."

"No!" I said. "If he wants to marry me, let him come to my house and ask my father and mother!"

"We don't want to ask," they said, and they just grabbed me to pull me away.

"No, no," I said. "I don't want to go! You have to ask!"

But they didn't stop, they put their hand over my mouth and just pulled me down the street! Yes, they did that!

A lot of Hmong girls get married like that. That kind of marriage is called "catch-hand". I was afraid, plus I didn't really want to go. I was only 14, I wasn't ready. But in our country, whether you're ready or not ready, if they pull you away and you go with them for two or three blocks, you cannot go back.[1]*. . .*

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1. May Xiong & Nancy Donnelly, *My Life in Laos*, 1 The Hmong World 201, 217 (1986).

Introduction

About 97,000 of the world's three million Hmong people live in the United States today.[2] Vicious Pathet Lao pogroms, in retaliation against those Hmong who fought for the United States in Vietnam,[3] drove one-third of the Laotian Hmong from their mountain homes to cramped refugee camps in neighboring Thailand.[4] Denied resettlement with native Thai Hmong in Thailand, and facing murder, persecution and starvation in Laos, waves of Laotian Hmong resettled in the United States after 1976. Most were ill-acquainted with literate, urban, industrial society.[5]

Hmong clans, organized by male kinship, reconstituted with vigor in the United States.[6] Large Hmong groups concentrated in California, Minnesota, Wisconsin, Texas, and Rhode Island, but clusters of Hmong families can be found in scores of urban and rural areas in many states.[7] Close clan ties reinforce Hmong identity and cultural practice.[8] However, some Hmong people refuse to abandon cultural practices that clash with American legal ideals.[9] This is particularly true of one type of traditional marriage practice, which involves the forced kidnap and rape of an unwilling bride.[10] The rape consent standards of most states might un-

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2. Kathleen M. McInnis, *Who Are the Hmong? in* The Hmong in America: Providing Ethnic-Sensitive Health, Education, and Human Services 1, 1-2 (Kathleen M. McInnis et al. eds., 1990) [hereinafter The Hmong in America].

3. Keith Quincy, Hmong: History of a People 192-97 (1988).

4. Yang Dao, *Why did the Hmong Leave Laos? in* The Hmong in the West: Observations and Reports 3, 18 (1982).

5. *See* Quincy, *supra* note 3, at 200-03.

6. *See* John Finck, *Clan Leadership in the Hmong Community of Providence, Rhode Island, in* The Hmong in the West: Observations and Reports 21-28 (1988). *See also* Cheu Thao, *Hmong Migration and Leadership in Laos and in the United States, in* The Hmong in the West: Observations and Reports 99, 117-19 (1988) (explaining the remarkable power that clan loyalty and leadership has over individual decision-making).

7. McInnis, *supra* note 2, at 6. The Hmong National Plan of Action lists representatives from small Hmong communities in cities throughout the United States, including cities in Illinois, Ohio, Pennsylvania, Massachusetts, Connecticut, Washington, Montana, Nebraska, Iowa, Kansas, Oklahoma, Colorado, North Carolina, South Carolina, Georgia, and Tennessee. Hmong American National Development Project, Hmong National Plan of Action 9 (1991). When Hmong communities are small, government bodies may delay attempts to understand Hmong culture until problems arise. *See Wife-buying case turned over to DA*, Louisville Times/Lafayette News, July 10, 1991, at 7 (noting that Lafayette, Colorado city council members, police representatives, and county officials began meeting with the leaders of 35 Hmong families only after a Hmong rape case and after Hmong complaints of cultural misunderstanding to the city council).

8. Kathleen M. McInnis, *The Hmong Family, in* The Hmong in America, *supra* note 2, at 25, 27.

9. Some refugees refuse to recognize American law when it conflicts with deeply ingrained cultural practices. Spencer Sherman, *Legal Clash of Cultures*, Nat'l L.J., Aug. 5, 1985.

10. Kathleen M. McInnis, *What Is Ethnic-Sensitive Practice? in* The Hmong in America, *supra* note 2, at 11, 14-15.

intentionally decriminalize this type of sexual assault on unmarried Hmong women because the consent standards contain a built-in cultural defense.[11] Reforms in American rape law may undermine the ability of Hmong men to assert this defense.

This Note will attempt to explain the confusing cultural issues encountered by lawyers involved in such cases, and explain how some cultural factors relate to American sexual assault law. Part I of this Note will examine the cultural foundations for the mistaken belief of consent defense in Hmong sexual assault cases. Part II will explain why such cultural defenses may be undesirable in the American legal system. Part III will address the American legal system's involvement in recent Hmong sexual assault cases, and Part IV will examine legal reforms that could change the outcome of these cases. Finally, Part V of the Note will explore other obstacles to the legal resolution of Hmong sexual assault reports.

I. Cultural Foundations

Modesty[12] and the lack of a body of Hmong literature[13] make it difficult to determine traditional Hmong attitudes toward sexual relationships. Also, Hmong in America have enculturated at different speeds, making it impossible to refer to a single Hmong view.[14] But generally, in *traditional* Hmong society, even a willing Hmong bride should seem reluctant to be married, protesting that she is too young or otherwise unready.[15] Anecdotal evidence says this mock unwillingness extends to sex itself, and should last throughout a virtuous woman's married life.[16]

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11. *See infra* Part III.

12. "[S]exual issues are not easily discussed in Hmong culture even between spouses." Kimberly Cohen, *Child Abuse in Hmong Culture*, *in* The Hmong in America, *supra* note 2, at 34, 37. Some body parts and functions cannot be spoken of between men and women. *See, e.g.*, Elizabeth Perkins & Pa Foua Yang, Suggestions for Health Care Professionals Who Interact with the Hmong (1989) (on file with author).

13. Although there are tales that the Hmong used and lost writing systems in the past, modern Hmong writing systems were not developed until this century. Generally, only members of important families were taught to read or write. *See generally* William A. Smalley et al., Mother of Writing: The Origin and Development of a Hmong Messianic Script (1990).

14. The degree to which an individual Hmong person may accept American laws and ideals can depend on his or her level of education, exposure to Western influence in Asia, time spent in this country, employment or schooling here, social interaction with non-Hmong, and the extent to which American values are accepted by his or her elders and leaders within the clan and the community. Elizabeth (Perkins) QuinnOwen, *Obstacles Faced by Hmong Women Considering Divorce or Seeking Custody of Their Children*, *in* Custody: The Challenge Continues. An Informational Manual for Battered Women and Advocates (Wisconsin Coalition Against Domestic Abuse eds., 1992).

15. Eagerness to go with a boy and join his family implies disrespect to one's

This mock resistance has led to the widespread confusion between two forms of Hmong marriage: elopement, which is consensual; and abduction, which is not.[17] It has also led to acceptance of arranged marriages, to which brides may or may not have agreed.

When young Hmong women have accused Hmong men of rape, many of the accused rapists have used this "mock resistance" to assert a mistake of fact defense, which goes like this: "Since consenting Hmong women pretend to resist sex, I believed this woman was consenting to sex, even though she struggled and cried and otherwise resisted."[18] Criminal law allows mistaken belief of consent to negate culpability in sexual assault.[19] At least one Hmong defendant has successfully asserted

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own family, and therefore is improper. Nancy D. Donnelly, The Changing Lives of Refugee Hmong Women 163 (1989) (unpublished Ph.D cultural anthropology dissertation, University of Washington).

16. An American refugee advocate who speaks Hmong says that a woman who seems too willing to have sex will be insulted and gossiped about in Hmong as one who has an "itchy pussy." Both men and women have told her that Hmong women give conflicting signals during sex, such as batting a man's hand away, but then lifting her hips to help him remove her clothing. Telephone interview with Ruth Hammond, Journalist, TWIN CITIES READER (Oct. 8, 1992). Others feel that sometimes the resistance is real, and that a woman's consent to sex is often irrelevant to her partner. *See, e.g.*, Mary Turnquist et al., Guidelines for Presenting Family Planning Services to the Hmong (Sept. 1985) (informally published manuscript prepared by the Refugee Women in Development Project of Lutheran Social Services of Wisconsin and Upper Michigan North Central Area, Wausau, Wisconsin) (on file with author) (asserting that sex meets male needs, is hurried, and shows little concern for female pleasure); Rebecca F. Smith, *Natural Family Planning for the Hmong*, *in* THE HMONG IN AMERICA, *supra* note 2, at 101, 102 (noting that men have complete authority to determine when and how often to have intercourse). *But cf.* HUGO A. BERNATZIK, AHKA AND MIAO 134-37 (Alois Nagler trans., 1970) (1947) (describing detailed and loving foreplay by young Hmong couples studied in Thailand, and noting that although girls are publicly chaste, they generally have no objection to premarital sexual intercourse).

17. In Hmong culture, there are four ways to begin marriage negotiations. In Laos, voluntary elopement was the most common. Abduction of the girl by the boy and his cousins was the second most common. Third, and most polite, was the unannounced arrival of a suitor and his marriage negotiators at the home of the girl's family. The least common start to marriage occurred when the girl's parents caught the couple having intercourse and forced them to marry. MYTHS, LEGENDS AND FOLK TALES FROM THE HMONG OF LAOS 207 (Charles Johnson, ed., 1985) (relating twenty-seven folk tales with extensive annotation on Hmong customs and beliefs, gathered to preserve Hmong oral history and provide cultural interpretation for refugee advocates) [hereinafter MYTHS, LEGENDS, AND FOLK TALES].

18. *See, e.g.*, Myrna Oliver, *Cultural Defense, a Legal Tactic*, L.A. TIMES, July 15, 1988. *See also* Donnelly, *supra* note 15, at 163, wherein she notes: "Thus, if the girl's protest is real, the boy has no way to tell."

19. Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2694 (1991).

this defense at a rare jury trial.[20] Using this standard, American courts may deny justice to an unmarried Hmong woman who is sexually assaulted by a Hmong man, simply because she and her attacker belong to the same ethnic group.[21] Her resistance, which American courts would normally view as evidence of her innocence, is rendered meaningless by her attacker's cultural beliefs.[22]

Accused rapists raise this defense whether or not the case goes to trial and whether or not the parties followed traditions.[23] As a result, courts have handed down light sentences in the few cases reaching disposition. Light sentences and little prosecution arguably have led to little deterrence.[24]

A close look at Hmong cultural beliefs reveals that Hmong men who abduct unwilling brides based upon cultural beliefs often are acting recklessly with regard to consent.[25] They are aware that rape is a possibility, but they proceed despite that risk. To understand the problem of sexual assault on unmarried Hmong women and girls in an American legal context, we must focus on two traditional cultural patterns: Hmong views of marriage, and Hmong views of crime.

A. Hmong Views of Marriage

In elopement, the two young people go through an exchange of personal tokens and a period of courtship, which may last just a couple of days.[26] If one or both families disapprove of the union, the couple can arrange to sneak off to the groom's family house, where they will

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20. *See infra* Part III.A.

21. For example, a prosecutor in one such rape case decided not to go to trial because "it would be almost impossible to convince a jury that the girl really meant no and had been taken away against her will and raped." He opted for a plea bargain. The defendant was fined $1,000 and spent no time in jail. Oliver, *supra* note 18.

22. B. Anthony Morosco, The Prosecution and Defense of Sex Crimes, § 3.01(3) (1991).

23. None of the cases examined in Part III of this note appear in reporters. The author traced these cases through newspaper articles and through word of mouth from refugee advocates and lawyers. *See also infra* Parts IV and V.

24. For example, a refugee advocate tells of one Hmong family whose twelve-year old daughter was forcibly abducted by a Hmong man from another state. The family called police, who located and returned their daughter. However, the prosecution dropped the charges against the man. Five years later, when negotiators from the same clan demanded the girl as a bride, the girl's mother threatened to call police. The negotiators merely laughed at her, noting that nothing happened to them the first time. Telephone conversation with Elizabeth (Perkins) QuinnOwen, refugee advocate, Oct. 26, 1992.

25. However, in most American jurisdictions, this does not make them criminally liable. *See infra* Part III.

26. Yaj Txooj Tsawb, *Excerpt from Outline of Marriage Rites*, *in* 99 The Hmong World 105 (David Strecker trans., 1986).

live.[27] The families immediately will give in, and marriage negotiations will take place about three days later.[28] Even in elopement, the girl may protest her unwillingness in an effort to avoid conflict with her family and to preserve her virtue.[29] The elopement, like all other forms of Hmong marriage, is followed by negotiation between the two clans to determine the "bride price," dowry, and wedding meal arrangement.[30]

In abduction, the girl may not even know the boy, or she may have refused him as a marriage partner. However, he can succeed in marrying her if he abducts her, takes her away from her family, and has sex with her.[31] A groom's reasons for abducting a bride include fear that the girl or her parents will reject him, fear that other, more desirable suitors will win the girl's hand, knowledge that the girl has already been committed to marry another man, or a desire to lower the bride price.[32] In addition, a girl may ask the boy to pretend to abduct her in an effort to avoid an open conflict of will with her parents.[33]

If the girl resists within her family's sight, they will fight off her attackers and she does not have to marry the boy.[34] Traditionally, the boy will bring two kinsmen with him to help subdue the girl.[35] If the boy manages to carry her away, she is considered married, whether she consents or not.

> [S]uppose they have pulled her far away, so that her parents do not know where she is and cannot hear her cries, and cannot

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27. *Id.* at 105.

28. *Id.*

29. *See* Donnelly, *supra* note 15, at 90 (noting that: "Even if she wants to marry, she has to say she doesn't want to marry."); and 99-100 (reporting that if parents ask a Hmong girl whether she likes a particular youth, instead of saying "Yes," she should "just cry."). *See also* MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 241-42 (reporting that a willing Hmong girl may cry with fear of her unknown future, and push the responsibility for the decision onto her parents, but a truly unwilling Hmong girl will refuse more forcefully).

30. The bride price, literally translated as milk price, is said to compensate the girl's parents for the cost and pain of raising her. However, culturally it serves as a symbol showing the subordination of the bride and groom to their elders in each clan. Donnelly, *supra* note 15, at 100-03. Prices are generally quite high, and serve such social ends as displaying the status of the groom's family, which can raise it, and the bride's family, which can command it. W.R. GEDDES, MIGRANTS OF THE MOUNTAINS 58 (1976). Therefore, anthropologists warn against seeing this as a mere sale of a woman. *Id.* at 58-59. However, some bride's families recently have used the American criminal justice system to force payment of higher bride prices, lending more credence to the theory of women as chattel. *See infra* notes 169-75 and accompanying text.

31. *See* Tsawb, *supra* note 26, at 105.

32. MYTHS, LEGENDS AND FOLK TALES, *supra* note 17, at 225-26.

33. *Id.* at 226.

34. *Id.*

35. Xiong & Donnelly, *supra* note 1, at 217.

> reach her. Then, when they have brought her to their house, they let someone bring a message to the girl's parents so that they will not worry. The boy's family has taken her away. If she is carried a distance of one armspan she is considered a member of [the boy's] family; if she is carried a distance of two armspans she is considered a member of their family. If she lives, she is considered a member of their family; if she dies, she is counted among their ancestral spirits. Therefore, let her parents accept the situation; let their hearts remain at peace.[36]

Forcible abduction and rape are risks clearly known to Hmong people. A formal marriage negotiation for a bride price follows both a successful abduction and an elopement.[37]

Confusion about the two forms occurs because both forms of marriage traditionally are valid, because even consensual relations can *appear* violent, and because both are followed by acquiescence and negotiation by the families. Confusion also occurs because the Hmong legal system did not penalize the rape of a young, unmarried girl, even if a marriage did not result.[38] A Hmong woman could be married completely against her wishes if her family agreed to the union.[39]

B. Hmong Views of Crime

In traditional Hmong society, custom and ideology serve as law.[40] Even in the United States, local or regional clan leaders arbitrate solutions, enforce fines, and mandate apologies.[41] All clan leaders are male.[42] There are no written laws that dictate these settlements: "Clan leaders contend the decisions are made based on concerns for fairness and in consideration of all parties' viewpoints."[43] However, decisions may show gender bias, reflecting Hmong perceptions of women's roles.[44]

Clan leaders punish most often with public humiliation and fines, paid by the offender's family to the victim's family.[45] They levy fines for theft, property damage, adultery, fathering an illegitimate child and

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36. Tsawb, *supra* note 26, at 107.

37. *Id.*

38. MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 94-95. In the United States, if a Hmong girl becomes publicly known as a non-virgin because of rape, clan resolution apparently involves an apology and compensation of bride price to the girl's family by the boy's family. *See, e.g.*, Beth L. Goldstein, *Resolving Sexual Assault: Hmong and the American Legal System*, *in* THE HMONG IN TRANSITION 135, 137 (1986).

39. MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 242 (noting that in a traditional setting, a girl can tell her parents she disagrees with their choice, but her parents' decision is the final one).

40. Donnelly, *supra* note 15, at 93.

41. *See* MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 315.

42. McInnis, *supra* note 8, at 28-29.

43. *Id.* at 28.

44. One refugee advocate notes that since the clan leaders are all male elders, their

refusing to marry the mother, and even for manslaughter and murder.[46] They do not use physical punishment or jail, except occasionally in Laos when the offender had to be bound and detained before trial.[47]

In this system, the Hmong punish the rape of a married woman because they consider such an act adultery.[48] The woman's consent is irrelevant because it is really her husband whom the rapist has wronged.[49] Clan leaders would order a guilty man to pay a fine and to be exposed to scorn and reproach, and sometimes to physical blows from the victim's husband.[50] However, the rape of a young, unmarried girl "would be taken much less seriously, and tolerated as part of the overall pattern of courtship by a man in search of a prospective marriage partner."[51] The blame would be laid on the girl for being lured into privacy with the boy because "if the female dog doesn't wag her tail, the male dog doesn't follow."[52] Clan leaders could find that a rape-induced marriage was valid even if the victim or her family disputed it.[53]

II. Cultural Defenses

The definition of rape as an affront to another man's property interest in his female chattel sounds an uncomfortable echo from our

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edicts are often gender-biased. For example, in a domestic abuse case, a man would be told to beat his wife less often, and the woman would be told she would just have to put up with being beaten from time to time. *See* QuinnOwen, *supra* note 14 at 3.

45. *See* Myths, Legends, and Folk Tales, *supra* note 17, at 310.

46. *Id.*

47. *Id.* at 315-16. Jails did not exist as part of the Hmong justice system in Laos. This conflicts with one prosecutor's attempt to resolve a Hmong rape case by accepting the assertion of the victim's aunt that in "the old country," justice could be satisfied by a short jail sentence. *See* Oliver, *supra* note 18.

48. A married Hmong woman's consent to sex is immaterial because she has no independent right to consent. Hmong people see the cuckolded husband as the primary victim of rape or adultery. Ruth Hammond, *Call it Rape*, Twin Cities Reader, Mar. 27-Apr. 2, 1991, at 8-9. Attacking a *married* woman was a serious offense under Hmong law, and resulted in a fine in silver bars paid to the husband. The Hmong phrase for such an attack translates as knocking over someone else's wife. Myths, Legends, and Folk Tales, *supra* note 17, at 94.

49. Myths, Legends, and Folk Tales, *supra* note 17, at 94.

50. *Id.*

51. *Id.* at 94-95. *See also* Letter from Lisa Capps, anthropologist, to the author (Nov. 28, 1992) (on file with author).

52. Donnelly, *supra* note 15, at 163.

53. *See* QuinnOwen, *supra* note 14, at 2. For example, during the Vietnam War, soldiers from some Hmong divisions forced personal tokens on young Hmong women and used that as a justification for rape. Clan leaders ruled these "marriages" valid. Telephone Interview with Nancy D. Donnelly, Ph.D. (Sept. 19, 1992). One could view this as a distortion caused by some clans' excessive consolidation of power during the war years. *See* Cheu Thao, *supra* note 6, at 118.

own legal past.[54] In one possible outcome of rape at ancient English law, the victim consented to marry the rapist, who then paid a fine to her father for the damage to her virginity.[55] Some of the world's people may still adhere to these beliefs.[56] Nonetheless, ancient English rape law hinged on the victim's non-consent, and the ancient English killed and mutilated rapists.[57]

American common law defines rape as a defendant's sexual intercourse with a woman not his wife, by force, and without consent.[58] Even those modern statutes that deliberately avoid mentioning consent seek to prevent and avenge non-consensual sexual contact.[59] Only murder is thought worse.[60] Ideally, current American rape law promotes and protects the physical autonomy of all human beings, recognizing the right of each individual to choose when to have sex and with whom.[61]

In comparison, traditional Hmong custom made the female's consent almost irrelevant. Pragmatically, a willing partner would be more desirable (and less trouble) as a potential wife. This would serve as a deterrent to rape aimed at marriage. There was a real possibility that a mistreated woman would commit suicide.[62] However, raping a non-consenting unmarried woman was not individually punished. Little deterrence meant little meaningful incentive for Hmong men to ensure their partner's consent. Rapes are inevitable in a social system that posits that all women resist, but not that all women consent.

American law generally does not accept a formal cultural defense as a justification for crime.[63] Some critics have argued that American respect for individual justice and cultural diversity should result in a formal cultural defense.[64] Some argue that American judges do not

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54. Susan Brownmiller, Against Our Will: Men, Women, and Rape 7-8 (1975).

55. *Id.* at 16.

56. *Id.* at 7.

57. *Id.* at 15-17.

58. Morosco, *supra* note 22, § 3.01(3).

59. *Id.*

60. "From earliest times the unique nature of the psychological as well as physical harm caused to the victim was recognized. . . . [T]he general attitude of society . . . is that no more horrible or wrongful act can be committed against a human being, short of intentional murder, than the act of forcible rape." *Id.* § 1.02(1)(a) (Aug. 1992).

61. Robin D. Wiener, Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 Harv. Women's L.J. 143, 159-60 n.104 (1983).

62. *See* Donnelly, *supra* note 15, at 102. In Laos, one committed suicide by overdosing on opium, which some Hmong raise as a cash crop. Geddes, *supra* note 30, at 216-18.

63. Note, *The Cultural Defense in the Criminal Law*, 99 Harv. L. Rev. 1293, 1293-94 (1986).

64. *Id.* at 1296-1307.

understand other cultures.[65] However, others point out that adopting the values of a defendant's culture abandons the human rights declared and protected by American law.[66] The idea that a woman's "no" really means "yes" and requires a man to exercise aggressive persuasion isn't much different from our own legal and cultural viewpoint of not long ago.[67] We are discarding laws that decriminalize some rapes as an unfortunate byproduct of male aggression and female coyness.[68] Americans may respect the survival of the Hmong family in the face of overwhelming odds. They may realize that survival came at a price: the sacrifice and obedience of the individual for the welfare of the group.[69] A woman's acceptance of family and clan resolution of sexual assault may display subservience of her injury to the needs of the group.[70] But relatavist appreciation of the values of other cultures does not dictate abandonment of American values.[71] America attracts immigrants partly by championing the rights of the individual. Denying these rights to victims in any cultural group, by failing to punish and deter crimes acceptable within that culture, corrupts the American promise of human rights for all.

However, the legal system considers cultural factors informally.[72] These "ghost" cultural defenses affect prosecutors' charging decisions

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65. *See* Matthew G. Davis, *Hmong Clan Celebrates 6 College Graduations*, ST. PAUL PIONEER PRESS-DISPATCH, July 19, 1992, at 1A.

66. *See* Allison Dundes Renteln, *Culture and Culpability: A Study of Contrasts*, 22 BEVERLY HILLS B. ASS'N. J. 17, 26-27 (1987-88). Renteln notes that: "[W]omen's rights and children's rights will never be protected if their traditions follow them everywhere they go." *Id.* at 26. *See also* Allison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 63 (1988) (arguing that if moral categories are accepted uncritically, conflicts involving absolutes like human rights are difficult to resolve).

67. *See, e.g.*, Roger B. Dworkin, Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 682 (1966) (arguing that it is customary for a woman to say "no" but mean "yes" and therefore invite male aggression).

68. *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1127 (1986).

69. For traditional Hmong, family needs and concerns outweigh individual needs, and Hmong-American children are torn between this value system and the American system, which stresses competition and individual development. McInnis, *supra* note 8, at 29. *But cf.* GEDDES, *supra* note 30, at 59 (asserting that individual rights are strongly embedded in Hmong culture).

70. When a Hmong woman decides her needs are best served through clan settlement, her wishes should be respected by police and prosecutors. However, the deterrent and the educational functions of punishment necessary to preserve the rights of other Hmong women will not be upheld. *See* Goldstein, *supra* note 38, at 137-42 (observing that a Hmong sexual assault victim mainly wanted her family satisfied with the court's decision, and her family mainly wanted to minimize the disruption of clan and kinship ties).

71. *See* Renteln, *Culture and Culpability: A Study of Contrasts*, *supra* note 66, at 25.

72. Note, *supra* note 63, at 1293-95.

and plea agreements, as well as judges' sentencing.[73] When the legal system informally accepts such cultural factors, it may cripple the individual rights of immigrant women in this country.[74] Beating, raping, or murdering women under certain conditions may not be considered a crime, or may be criminal, but excused, in other cultures.[75] When American prosecutors and judges, perhaps eager to appear culturally sensitive, drop charges and sweeten sentences to accommodate other cultures, they inform other potential perpetrators that such criminal conduct is understandable, perhaps even acceptable, within that ethnic group. Courts reinforce the message if they allow culturally-influenced formal defenses to excuse the crimes.

The next section will examine how defendants have used the formal defense of mistake of fact as to consent as a cultural defense in Hmong sexual assault cases.

III. The Mistake of Fact Defense in Hmong Rape Cases

In rape cases, when the defendant and the complaining witness know each other, the accused often raises the affirmative defense that he honestly and reasonably believed the woman consented to sexual activity.[76] Non-consent is the line separating legal and illegal sexual acts.[77] At common law, the actual presence of consent or non-consent in the victim's mind is not at issue.[78] The victim must unambiguously manifest her non-consent to the rapist and, vicariously, to the court that will eventually judge her actions.[79]

In rape cases where Hmong men have been accused of sexually assaulting unmarried Hmong women, the men have raised the defense of reasonable belief of consent.[80] When defendants insert the cultural information that Hmong women "always resist sex," non-consent becomes difficult for the prosecution to prove.[81] Under the common law, American women have been forced to prove their own innocence through

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73. *Id.* at 1295.

74. *See* Kathleen Hendrix, *World's Women Speak as One Against Abuse*, L.A. Times, May 17, 1991, at 1E (reporting that refugee advocates decry the use of cultural evidence as a legal defense for violence against women); Dick Polman, *After a Killer Eludes Jail, A 'Cultural Defense' is on Trial*, Philadelphia Inquirer, July 2, 1989, at A1 (reporting feminist uproar after a Chinese man murdered his unfaithful wife, used cultural evidence at his sentencing hearing, and received five years probation with no jail time).

75. *See* Hendrix, *supra* note 74, at 1E.

76. Berliner, *supra* note 19, at 2688.

77. Estrich, *supra* note 68, at 1094.

78. Berliner, *supra* note 19, at 2689.

79. *Id.* (noting that the prosecution "must prove actual refusal; mere absence of consent or silence will usually be insufficient for conviction.").

80. *See infra* Part IV.

81. *Id.*

resistance.[82] Because of the cultural evidence presented by Hmong defendants, this avenue is barely open to Hmong women.

A. Formal Use of the Defense

For example, in a rare case brought before a jury in 1989, a Hmong man was acquitted of attempted rape, using the mistake of consent defense.[83] According to the complaining witness, the defendant, a relative, came to her home to negotiate for her hand in marriage. She declined because he was "too pushy."[84] She said that although he threatened to abduct her, she laughed it off. When they were alone in the house, she said he grabbed her, pulled her onto his lap, and stuck his hand under her shirt and squeezed her breast as she struggled, kicked, and hit.[85] She said they fell to the floor and he ripped off her pants and underwear, damaging the zipper on her pants.[86] As she screamed and cried, she said he told her in Hmong that he was going to rape her.[87] She said when he removed his shorts, she thought she kicked him in the groin, which made him stop and allowed her to flee the house.

The defendant first told police investigators that the events were part of a Hmong courtship ritual. He said Hmong women never really say "yes" to sex, but say "no" when they mean "yes."[88] While testifying, the defendant said he did not see the woman cry, nor was it obvious that she was upset. He said he "notice[d] that when her pants were off, that she became sad,"[89] and she said "[S]top it. You cannot do this to me."[90] He said he stopped his attack when he realized she was serious, not because she kicked him.[91]

The deputy district attorney who prosecuted the case felt the jury found the defendant credible, believing he perceived the initial struggle as "a little Hmong game."[92] They acquitted him because he abandoned

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82. Estrich, *supra* note 67, at 1098-1100.

83. People v. Kue, No. CR24956 (Ventura County [Cal.] Mun. Ct. filed July 11, 1989).

84. Memo from Michael R. McKendry, Investigator in the *Kue* case (July 7, 1989) (on file with author).

85. *Kue* (R. at 11-12) (filed Nov. 17, 1989) (on file with author).

86. *Id.* (R. at 19-20).

87. *Id.*

88. People v. Kue, Application for Extradition, No. FE54036, p.3, 11.10-11 (Mar. 20, 1989).

89. People v. Kue, No. CR24956 (R. at 2).

90. *Id.* (R. at 2-3).

91. *Id.* (R. at 3).

92. Telephone Interview with Patrice Koenig, Deputy District Attorney, Ventura County, Cal. (Jan. 5, 1993).

his attempt when the woman made her non-consent clear.[93] If the purpose of the resistance requirement is to give attackers "full and fair warning that their (forceful) advances constitute an unwelcome rape," rather than seduction, then clearly a Hmong woman must submit to at least some sexual attack before convincing her Hmong assailant that her "no" means "no."[94]

In extreme circumstances, a jury may reject a mistake of fact defense asserted by a Hmong defendant. In another 1989 case, a jury convicted a 33-year-old man who paid a $10,000 bride price for a 10-year-old girl.[95] The defendant testified they were boyfriend and girlfriend, and the 10-year-old recanted her rape accusation on the witness stand.[96] However, the girl's adult brother had taken her to a doctor after her "wedding night."[97] The doctor testified that the girl, upset, crying, and bleeding from her vagina, said she had been raped.[98] Apparently, the girl's extreme youth, coupled with medical evidence of injury, convinced the jury that her initial rape accusation was not merely culturally proper Hmong coyness.

B. Informal Use of the Mistake of Fact Defense

Because Hmong rape trials are scarce, the legal system frequently weighs the mistake of consent defense informally. It influences how seriously the police will take a rape report.[99] Prosecutors, using their discretionary estimates of justice and case strength, will reduce or drop charges, or bargain in exchange of a plea.[100] Judges also consider cultural factors in mitigating a defendant's sentence.[101]

These informal considerations are evident in several recent cases involving sexual assaults of unmarried Hmong women. In a 1991 Colorado case, the family of a 21-year-old man paid an $8,300 bride price

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93. *Id.* Voluntary withdrawal from a criminal act, or failure to go beyond mere preparation, is a defense to a charge of attempt. The withdrawal is not voluntary if motivated by a change in circumstances that makes the criminal conduct more difficult to accomplish. WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 6.3 (2d ed. 1986).

94. Estrich, *supra* note 68, at 1131.

95. *Clerk Seized in Child Sale*, SAN JOSE MERCURY NEWS, Apr. 21, 1989, at 2F. *See also* Telephone interview with Holly Van Der Meer, former detective for the city of Long Beach, Cal. (Nov. 25, 1992).

96. Telephone interview with Holly Van Der Meer, *supra* note 95.

97. *Id.*

98. *Id.*

99. *See infra* Part IV.B.

100. *See* Note, *supra* note 63, at 1295.

101. *Id.*

for his unwilling fifteen year-old cousin.[102] She was held in their home and not allowed to use the telephone or leave the house unchaperoned.[103] During that time, she said the man attempted to rape her.[104] Police arrived after the girl slipped a note to a neighbor that said "I'm not his wife. They force me here and I want to go back to Fresno."[105]

However, because cultural factors made the case "confusing," police didn't arrest anyone.[106] They chose to turn the case over to the district attorney.[107] The prosecutor initially charged the twenty-one-year old man with second degree kidnapping, conspiracy, attempted rape, and third-degree sexual assault.[108] Prosecutors also charged his parents with kidnapping and conspiracy.[109] In the plea agreement, the man and his father pleaded no contest to the charge of conspiracy to commit second-degree kidnapping.[110] The state dropped all other charges.[111] In return for the plea, the prosecutor recommended the defendant serve no jail time, pay no fine, and perform no community service.[112] The judge deferred sentencing.[113]

The prosecutor noted that his recommendations were prompted by "cultural diversity."[114] The defense attorney emphasized that his clients did not admit any guilt with their no contest plea. They were convinced they had done nothing wrong. Later, the defendants sued unsuccessfully to recover the bride price from the girl's family.[115]

In a 1987 Minnesota case in which a man abducted and raped a thirteen-year-old Hmong girl, a prosecutor decided that cultural evidence of resistance by consenting women would make it too difficult to prove non-consent to a jury.[116] As the result of a plea bargain, the court fined the defendant $1,000 and refused to give a jail sentence.[117]

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102. *Hmong Pair Won't Contest Kidnap Charge*, THE FRESNO BEE, Nov. 7, 1991.

103. Kevin McCullen, *Coloradan Charged With Buying Bride, 15*, ROCKY MOUNTAIN NEWS, July 16, 1991, at 6.

104. *Id.*

105. *Id.*

106. *Wife-buying case turned over to DA*, *supra* note 7, at 7.

107. *Id.*

108. McCullen, *supra* note 103, at 6.

109. *Id.*

110. George White, *Hmong Case to be Settled with Pleas This Afternoon*, LOUISVILLE TIMES/LAFAYETTE NEWS, Nov. 13, 1991 at 1.

111. *Id.*

112. *Id.*

113. *Id.* at 1, 16.

114. *Id.* at 16.

115. *Bride-For-Money Agreement Not Enforceable, Court Rules*, THE FRESNO BEE, Jan. 12, 1992 (copy of article on file with author).

116. Oliver, *supra* note 18.

117. *Id.*

Finally, in a 1985 California case, the prosecution charged a Hmong man who abducted and raped a woman with kidnapping and rape.[118] In a plea agreement, the prosecutor dropped both felony charges, and the man pleaded guilty to the misdemeanor offense of false imprisonment.[119] After reading literature documenting Hmong marriage customs, the judge sentenced the defendant to 120 days in jail and a $1,000 fine.[120]

Light sentencing in these cases springs from sensitivity to the idea that neither a Hmong defendant nor a jury can distinguish resistance that means "yes" from resistance that means "no." So far, the legal system has refused to impose a *duty* on Hmong men to distinguish between them. As a result, Hmong men remain free to impose their will on resisting Hmong women without making an effort to ensure consent. Modern reform of rape law could change the outcome of similar cases.

IV. Reform

In the past two decades, feminists have spearheaded reform of rape law.[121] Traditional rape law was considered sexist and unresponsive to women's need for physical and sexual autonomy.[122] Many reforms target the requirement that women vigorously resist as a demonstration of non-consent. Feminists argue that this requirement puts rape victim's actions on trial and forces women to risk personal injury during the crime to prove their innocence in the courtroom.[123] Little or no physical struggle by a woman has been insufficient to give the man fair warning that he is raping, even if the woman demonstrates non-consent in other ways.[124]

The difficulty a Hmong woman experiences is different. Traditional American law normally would vindicate her physical struggle as proof of non-consent. However, a Hmong woman's actions fail to give "fair warning" to her attacker because of his cultural belief that her "no" means "yes." This is why rape law reforms that address the resistance requirement can change the outcome of Hmong rape cases. Two such reforms are: (1) the addition of a mens rea requirement to the crime

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118. Julia P. Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 Ga. J. Int'l & Comp. L. 335, 336-37 (1986).

119. *Id.*

120. Oliver, *supra* note 18.

121. Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 Wash. L. Rev. 543, 569 (1980).

122. *Id.* at 570.

123. Estrich, *supra* note 68, at 1100-01.

124. *Id.* at 1111-15.

of rape, and (2) the statutory redefinition of "consent." Both of these reforms work by shifting the burden of communicating non-consent from the woman to the man.

A. Addition of Mens Rea

Unlike most serious crimes, traditionally defined rape contains no mens rea requirement.[125] Instead, courts developed requirements that men use force, and women resist, before justice cried rape.[126] Judges believed the force/resistance requirement would make it obvious which women were truly not consenting. The requirements became the functional equivalent of mens rea in rape.[127] Removing the burden of proving mens rea seems like a blessing to the prosecution, which has one less element to prove. However, some commentators believe it shifts focus from the defendant's behavior to the woman's.[128]

Most American jurisdictions still refuse to add a mens rea requirement to the crime of rape.[129] England, however, has required a showing of reckless mistake of fact to sustain a rape conviction.[130] Recklessness exists in at least four situations: (1) where the rapist realizes the woman may not be consenting, but hopes she is; (2) where he realizes she does not consent but is determined to have intercourse with her anyway; (3) where he is so intent on having intercourse that he closes his mind to the risk of non-consent; and (4) where he does not bother to think about consent at all.[131] In general, a criminal defendant is reckless when he is aware of, but consciously disregards a substantial and unjustifiable risk.[132]

It is likely that Hmong men who force themselves on apparently unwilling women possess a reckless state of mind. The rape of at least *some* unwilling women is the foregone, culturally-accepted risk of their actions.[133] If culture informs a Hmong man that "all" Hmong women seem to resist, culture also informs him that some women mean it. His

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125. Morosco, *supra* note 22, § 3.01(3)(a). Usually, bad conduct is not criminalized unless accompanied by a bad state of mind, or mens rea. LaFave & Scott, *supra* note 93, at § 3.1.

126. Morosco, *supra* note 22, § 3.01(3).

127. *Id.*

128. *Id. See also* Estrich, *supra* note 68, at 1098.

129. Morosco, *supra* note 22, § 3.01(3). *Cf.* Laseter v. State, 684 P.2d 139 (Alaska Ct. App. 1984) (criminalizing reckless mistake of fact as to consent); People v. Mayberry, 542 P.2d 1337 (Cal. 1975) (criminalizing negligent mistake of fact as to consent).

130. *See* Jennifer Temkin, *The Limits of Reckless Rape*, Crim. L. R. 5.

131. *Id.* at 5-6.

132. Model Penal Code § 2.02(c) (1985).

133. *See* Tswab, *supra* note 26; Xiong, *supra* note 1 and accompanying text.

appreciation of, but disregard for, this risk would make him culpable under a mens rea of recklessness or negligence.[134]

Another way to describe the mens rea requirement involves the reasonableness of the defendant's belief.[135] California penalizes those who are negligent in forming a mistaken belief of consent: that is, those whose belief was unreasonable.[136] Prosecutors attacking this defense emphasize that a reasonable man would not believe that a struggling, crying woman is consenting to sex.[137] In Hmong cases, this has led to a debate about whether courts should judge Hmong defendants as generic reasonable men (an objective standard) or as reasonable Hmong men (a standard that takes subjective characteristics into account).[138] If the court tells a jury that people raised in Hmong culture can appreciate the risk that a struggling woman might not be consenting, the standard of the reasonable man or the reasonable Hmong man theoretically should not yield a different outcome.[139]

The police reports of an unprosecuted 1989 case contain a male and female perspective of one such alleged rape.[140] A sixteen-year-old girl told police she was lured into a car by a young man she knew and his friend, who told her they were taking her to a store to buy a tape. Instead, they began driving her to a city two hours to the north. The girl realized that the two men were abducting her. They told her that they were taking her to marry. Furious, she attempted to jump out of the moving car, but her assailants pulled her hair and forced her to stay inside. She threw her coat out the window and grabbed the steering wheel to try to make them stop, but they would not. When they arrived, the girl said she was forcibly carried into an apartment and raped. She said her assailant told her that if she were "nice" he would take her home. During the next two days, she was moved from house to house to avoid the police, who had been alerted by a witness to the struggle. Her assailant raped her twice more.

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134. A reckless state of mind also encompasses negligence. MODEL PENAL CODE, *supra* note 132, § 2.02(5).

135. For a review of American courts' application of the defense, see generally Berliner, *supra* note 19.

136. *See, e.g.*, People v. Mayberry, 542 P.2d 1337 (Cal. 1975).

137. Telephone interview with Patrice Koenig, *supra* note 92.

138. In *People v. Kue*, No. CR24956, the court allowed the prosecution and the defense to argue both standards to the jury.

139. The prosection did not use an expert in *Kue*.

140. Because clan arbitration resolved the rape allegation, the complaining witness and the accused became unavailable to police investigators. *See* Eau Claire (Wis.) Police Dept., Case no. 89-38218 (case reports on file with author); La Crosse (Wis.) Police Dept., Incident no. 89-40634. *See also* Part V, discussing clan arbitration as an obstacle to legal resolution of Hmong rape complaints.

Police never interviewed the boys involved in the abduction because clan members, afraid the youths would be arrested, refused to tell police where they were. However, a young male relative offered their side of the story. He said the accused and the girl had actually been "boyfriend" and "girlfriend," although they lived in separate towns. A month earlier, the girl's mother visited the boy's parents and said she would like the boy as a son-in-law. Therefore, the boy thought it would be "fine" to abduct the girl, but she decided not to marry him during the "wedding ceremony." The accused boys refused to talk to police, saying the matter had been resolved through the clan.

The young man believed the marriage was "fine" because the girl's mother thought the marriage was a good idea. He believed this despite every manifestation (struggling, coat-throwing, wheel-grabbing) that his "bride" felt differently. Her resistance showed that she might not have consented, but he hoped she had: thus exhibiting his reckless state of mind.[141] American law should impose upon him a duty of ensuring consent. By traditional Hmong standards, the family's consent may override the feelings of the girl herself.[142] But that does not mean that a Hmong following traditional standards is somehow incapable of appreciating the real risk that the woman does not consent. It is merely that Hmong culture downplays the seriousness of the resulting injury.[143] American law does not.[144]

On the other hand, a Hmong man obeying traditional standards might honestly, reasonably, and mistakenly believe in the girl's consent. Factors contributing to an honest belief include an exchange of personal tokens,[145] a courtship, however brief,[146] or the successful conclusion of wedding negotiations. The relative youth of a Hmong girl generally would not reveal non-consent. Compared to American standards, Hmong people usually marry at an extremely young age.[147]

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141. *See supra* note 134 and accompanying text.

142. *See supra* note 39 and accompanying text.

143. Hmong culture views the rape of an unmarried girl less seriously because it is tolerated as part of the overall pattern of courtship by a man in search of a prospective marriage partner." MYTHS, LEGENDS, AND FOLK TALES, *supra* note 17, at 94.

144. *See supra* note 60 and accompanying text.

145. The exchange of personal tokens is prima facie evidence of consent. An eloping girl can display her boyfriend's token to her alarmed parents as a way of acknowledging her consent without admitting it. Telephone interview with Nancy D. Donnelly, Ph.D. (Sept. 19, 1992).

146. Direct courtship often lasts only a few days. Donnelly, *supra* note 15, at 161.

147. Hmong people see adolescence as the period between puberty and marriage. Lisa L. Capps, Hmong Adolescents' Perception of Gender Roles and Marriage 8 (Nov. 18, 1988) (unpublished manuscript, on file with author). Most Hmong girls in America are married by age 16. Donnelly, *supra* note 15, at 163. Hmong teenagers have been

These factors indicate a willingness to marry, and indirectly, a willingness to consent to sexual intercourse. They solidify an honest and reasonable, even if mistaken, belief. However, neither desire for eventual marriage, or even marriage itself, proves that partners are always willing participants in sex.[148] A defendant could also have formed a reasonable belief through a more direct expression of consent.[149]

B. Redefining Consent

Another approach to shifting the burden of communicating non-consent is to redefine the consent element in rape statutes. States designed such statutes to focus on the offender's forceful conduct, rather than whether the victim's resistance was convincing enough.[150] The statutes define consent in terms of words or overt actions that indicate a freely given agreement to sexual intercourse.[151] Using this standard, the fact finder can cease its point-of-view struggle: male or female, Hmong or non-Hmong.[152] Its attention is focused on whether the defendant, by word or conduct, ensured that his partner was a willing one.

The disadvantage of this type of analysis is that it might not reflect people's behavior. Actions indicating consent might not be obvious or unambiguous.[153] Also, expecting a traditional Hmong man to stop and ask permission to act aggressively, or expecting a traditional Hmong woman to abandon coyness, might be expecting them to abandon the culturally prescribed sex roles that make them attractive to one another.[154] The proponents of statutory redefinition recognize that the rules might not reflect typical behavior, but argue that our legal system should set standards of behavior and require people to comply with them.[155] Because violent consensual sex has no countervailing social utility, reform proponents argue that we should not err in favor of those who wish to practice it.

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known to pressure their parents to allow early marriage. QuinnOwen, *supra* note 14, at 2.

148. Although a man's rape of his wife was not criminal at common law, recent reform in many states has abolished the marital rape exemption. Morosco, note 22, § 3.01(2).

149. *See infra* Part III.B.

150. *See* Wiener, *supra* note 61, at 144-45.

151. *See, e.g.*, Wis. Stat. Ann. § 940.225(4) (West 1982) (Supp. 1992); Ill. Compiled Stat. Ann. S/12-17(a) (Smith-Hurd 1993).

152. Wiener, *supra* note 61, at 158.

153. *See* Telephone interview with Ruth Hammond, *supra* note 16.

154. However, Hmong youth apparently do not mention these traits when reporting what they look for in a mate. Donnelly, *supra* note 15, at 97-100.

155. Our system should criminalize forcible, non-consensual sex to announce to society that these actions are prohibited, and to deter them. Estrich, *supra* note 68, at 1183.

V. Obstacles to Legal Resolution

As Hmong people assimilate, the type of rape discussed here may become less frequent, but rape reporting may increase.[156] Clan leaders are losing power to enforce dispute resolution over assimilated Hmong, so disputants turn to American law.[157] Two obstacles impede the American criminal justice system's resolution of Hmong rape cases: (1) lack of access to the courts; and (2) the manipulation of the legal system by people seeking leverage in clan fine and bride price disputes.

A. Lack of Access to American Courts

Hmong immigrants are barred from American courts by more than simple language problems. Distrust of police and courts, reporting delays, and interpretation tainted by clan ties and touchy sexual topics cripple criminal justice investigations.

Some Hmong people avoid American justice because they think they will be punished for not understanding American ways, or for practicing traditional ways.[158] Many traditional Hmong practices conflict with American law, including polygamy, marriage of minors, ritual slaughter of animals, and possession and barter of opium.[159] Choosing American justice and American gender roles may be seen as a rejection of Hmong culture and individual cultural identity.[160] Also, convictions and sentences that seem unjust to Hmong people cause them to lose confidence in American courts.[161]

Because of the abduction form of some marriages, rape reporting may be delayed for as long as it takes for the girl to return home. Her parents, thinking the girl eloped, or hoping for clan resolution, will not report the girl missing. In the meantime, vital physical evidence disappears.

Finally, police and courts have been unable to ensure quality Hmong interpretation.[162] This is partly due to the recency of the Hmong writing,

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156. Donnelly, *supra* note 15, at 165 (noting that the American legal system is diminishing parents' and husband's absolute power over Hmong women); Sherman, *supra* note 9, at 26-27 (noting that Hmong women are growing bolder and turning to the legal system as they become aware of their rights).

157. *See Police Stuck in Wedding Deals*, The Fresno Bee, July 19, 1989.

158. Sherman, *supra* note 9, at 27.

159. Katherine Bishop, *Asian Tradition at War with American Laws*, N.Y. Times, Feb. 10, 1988, at A18.

160. Donnelly, *supra* note 15, at 155-56.

161. Hammond, *supra* note 48, at 11 (quoting a Hmong woman, upset by a rape conviction, saying innocence doesn't matter in American courts).

162. *See* Ruth Hammond, *Lost in Translation*, Twin Cities Reader, Mar. 11-17, 1992; Ruth Hammond, *Lost in Translation, Part 2*, Twin Cities Reader, Mar. 18-24, 1992, at 8-11.

as well as a lack of Hmong words to translate American legal terminology.[163] But Hmong interpretation is plagued with special cultural problems. Some sexual conversations are inappropriate for Hmong men and women. Therefore, when the translator is of a different sex, verbatim translation is difficult.[164] Often, the only available interpreters are relatives of those who are testifying or being questioned.[165] This can taint the interpretation, if the interpreter feels compelled to help the witness.[166] Although Hmong people generally value truthfulness, lying to further family or clan interests is acceptable.[167] Police in areas with large Hmong populations go to great lengths to find unrelated interpreters—a difficult task because Hmong family loyalty extends beyond the nuclear family to everyone within a clan kinship group.[168]

B. Manipulation of the Legal System

Some observers believe that participants in traditional clan arbitration use the American legal system to force compliance with the clan system. For example, some observers believe a Minnesota Hmong man was accused and convicted of the rape of two married Hmong women in 1990 merely because he refused to pay a fine levied by Hmong elders for adultery.[169] They believe that the women's husbands and their clan elders used the American legal system to avenge his disrespect for the traditional system.[170]

Similarly, police in California complained to newspapers and clan elders about the hundreds of rape reports they received from unmarried women.[171] These cases collapsed after little investigation.[172] Police discovered that when the girl's families were upset with the bride price offered or received after an abduction, they would call police and report the rape.[173] Then, when the clans resolved the payment problem, the girl's story would change.[174] The manipulation of the legal system has

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163. *See generally* Hammond, *Lost in Translation*, *supra* note 162.
164. Goldstein, *supra* note 38, at 140.
165. *Id.*
166. Donnelly, *supra* note 15, at 57; Hammond, *Lost in Translation, Part 2*, *supra* note 162, at 11 (reporting one translator who altered testimony to make it more consistent with previous versions of a story).
167. *Id.*
168. Telephone interview with Joel Popejoy, Fresno police detective (Nov. 1992).
169. Hammond, *Call It Rape*, *supra* note 48, at 9.
170. *Id.*
171. *Police Stuck in Wedding Deals*, *supra* note 157.
172. Telephone interview with Joel Popejoy, *supra* note 161.
173. *Police Stuck in Wedding Deals*, *supra* note 157.
174. Telephone interview with Joel Popejoy, *supra* note 161.

made it difficult for police to take Hmong rape complainants seriously.[175]

VI. Conclusion

Rape law's mistake of consent defense allows Hmong immigrants to impart their ideas of gender roles and sexual assault into American law. Because the American legal system does not penalize some Hmong men's reckless mistakes with regard to consent, it administers trivial or no punishment for the rape of unmarried Hmong women. Rape law reform could result in more convictions and punishment where men do not ensure their partner's consent. However, interpretation and manipulation problems remain a bar to the American system, and the clan justice system will likely remain the court of first resort for most Hmong people.

As Hmong people assimilate through education and employment, Hmong women might report rape more often. Eventually, refugee camps will close, new immigration will end, and the Hmong-American population may discard gender roles that prescribe resistance for Hmong women and aggression for Hmong men. However, the future will bring new waves of immigrants, and many will have gender ideals that justify some rapes. American rape law should deter these men and protect these women, no matter where they are from.

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175. *Id.*

Networking Software Copyrights and the Semiconductor Chip Protection Act: A Study of Legal Protection for Application Specific Integrated Circuit Technology

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Introduction

From life-saving medical equipment to the latest video game, electronics technology increasingly influences modern-day life. An inevitable tangent is the struggle to define legal rights in this technology. Frequently, computer programmers and electronics developers contend with technopirates who duplicate and distribute misappropriated technology. The high cost of technology development and the comparatively low cost of duplication intensifies the problem.[1] The resulting legal conflicts range from a video game manufacturer's misappropriation of software,[2] to a microscopic inspection of electronic chips for similarity.[3] Currently, federal copyright law is the primary means of preventing unauthorized duplication of computer software.[4] Similarly, the Semiconductor Chip Protection Act of 1984[5] (SCPA) protects integrated circuits—the mainstay of modern electronic hardware. The novelty of these protection methods and the uncertainties surrounding new technology raise interpretive issues. A paramount issue is how to legally distinguish between hardware and software.

A special family of electronic chips—Application Specific Integrated Circuits (ASICs)—epitomizes this struggle. Most integrated circuits come from the supplier fully defined and ready for immediate use in an electronic device,[6] but ASICs require the purchaser to define some func-

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1. H.R. Rep., No. 781, 98th Cong., 2d Sess. 2-3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5750-52.

2. *See* Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 841-42 (Fed. Cir. 1992), *reh'g denied*, 1992 U.S. App. LEXIS 30957.

3. *See* Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1564 (Fed. Cir. 1992), *reh'g denied*, 1993 U.S. App. LEXIS 415.

4. *See e.g.*, Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1248 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

5. Semiconductor Chip Protection Act of 1984, Pub. L. 98-620, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-914 (1988)).

6. *See* Parag K. Lala, Digital System Design Using Programmable Logic Devices 1 (1990).

tional characteristics before using the component.[7] The undefined state of ASICs resembles a pre-printed form with unfilled blanks. To fill in the blanks, the ASIC purchaser describes custom electronic features with special software.[8] Dedicated equipment translates these software descriptions into physical changes to the ASIC chip.[9] As a result of this "personalization" process, an ASIC becomes a hybrid of hardware and software. Thus, analyzing the protection available to personalized ASICs provides unique insight into software copyright and SCPA issues.

Case law providing categorical protection to ASICs is unlikely, given the breadth and evolving membership of this class of chip.[10] Nonetheless, specific legal controversies concerning ASICs abound.[11] In addition, chip developers employ special design techniques to impede technology piracy.[12] A global market[13] in excess of eight billion dollars[14] characterizes the economic role of ASICs. Growing consumer markets for automobile navigation systems and cellular telephone networks are predicted to boost

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7. *See* Jeffrey L. Hilbert, *Introduction to ASIC Technology, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 2-5 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

8. Ronald Collett, *Market Dynamics of the ASIC Revolution, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 22-23 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

9. *Id.* at 10, 22-23.

10. *See* LALA, *supra* note 6, at 4-7, 167-68, 242-43.

11. One type of ASIC, a Read Only Memory (ROM), can be copyrighted as a software vehicle. Apple Computer Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984). *See* Gerard V. Curtin, Jr., Comment, *The Basics of ASICs: Protection for Semiconductor Mask Works in Japan and the United States*, 15 B.C. INT'L & COMP. L. REV. 113 (1992) (discussing the inadequacy of international protection of ASICs offered by the SCPA and parallel legislation in Japan); Glynn S. Lunney, Jr., Note, *Copyright Protection for ASIC Gate Configurations: PLDs, Custom and Semicustom Chips*, 42 STAN. L. REV. 163 (1989) (arguing for the extension of copyright to ASICs). *See also,* Russell Flannery, *Taiwan Fears U.S. Trade Retaliation*, ELECTRONIC NEWS, April 27, 1992, at 10 (discussing Taiwanese chip piracy, including ASICs); *NCR Hits AT&T with Antitrust Suit*, ELECTRONIC NEWS, January 28, 1991, at 1 (revealing NCR assertion that AT&T merger resulted in unfair control of ASIC market).

12. Intel, the manufacturer of the recently released Pentium microprocessor, requires assent to a nondisclosure agreement before users can obtain access to key programming features of the device. This approach, at least temporarily, preserves a competitive advantage. Spencer Katt, *Katt's catch of the day: Appendix H is no help when the chips are down*, PC WEEK, May 17, 1993, at 128. Several types of ASICs include a security feature to prevent reading the programmed pattern which defines the custom features of the device. *See* LALA, *supra* note 6, at 7.

13. Dev Chakravarty, *Marketing ASICs, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 48-50 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

14. *See* Ronald Collett, *Market Dynamics of the ASIC Revolution, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 8 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

the ASIC market to fifteen billion dollars by the mid-1990s.[15] Federally funded ASIC projects, like high-performance computers, devices to assist the disabled, medical equipment, and military systems[16] punctuate the importance of ASICs. Thus, a close examination of legal protection available for ASICs not only enhances academic insight into software copyrights and the SCPA, but also responds to the expanding social and economic impact of ASICs.

Part I of this Note explains the technology at issue. Part II provides an analysis of the federal intellectual property protection available to ASICs. To fill potential gaps in protection and promote consistent application of the Copyright Act and the SCPA, Part III recommends complementary protection of ASICs under both acts and "judicial license" to adapt intellectual property statutes to new technologies.

I. The Technology Behind Integrated Circuitry

The advent of the integrated circuit in 1959 founded modern electronics, leading to the first microcomputers in the early 1970s.[17] Rapid advances continued through the seventies and eighties, culminating in the vast software and hardware industries of the nineties. The software industry is the more novel of the two areas because it depends on a mature electronics industry. This chronology prompts a description of hardware first.

A. Hardware

Electronic hardware designs include two types of circuits—linear and digital. Linear circuits continuously respond to an input signal to provide a continuous output. For example, adjustment of a light dimmer continuously changes light intensity. In contrast, digital circuits manipulate discrete signals. For example, the flip of a light switch alternates between the discrete states of *off* and *on*.[18] ASICs depend on a digital interface to personalize the circuit. This dependance calls for a more detailed discussion of digital design.

Digital circuitry usually represents the binary states of *off* and *on* as low and high voltages, respectively. The numerals "0" and "1" symbolically represent these voltages.[19] Although a single two-state signal

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15. *See id.*

16. Search of WESTLAW, FEDRIP-AB Library (July 20, 1993) (searching for the term "ASIC").

17. H.R. Rep., No. 781, 98th Cong., 2d Sess. 2 & n.2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5752 & n.2.

18. *See* Paul Horowitz & Winfield Hill, The Art of Electronics 316-17 (1980).

19. *Id.* at 317; Wils L. Cooley, *Circuit Principles, in* Electronic Engineers' Handbook 3-47 to 3-50 (Donald G. Fink & Donald Christiansen eds., 1989).

or bit is rather simplistic, an alignment of many bits can encode numbers, characters, and other information. For example, an alignment of eight bits creates a byte which may represent as many as 256 numbers.[20]

Digital designs break down into logic and memory functions. As the name suggests, logic circuits provide decision-making capability. For instance, these circuits compare or manipulate encoded information and provide the result as output signals.[21] These outputs might serve as inputs to additional logic devices, creating a complex chain of circuitry. In contrast, memory cells retain the state of a bit indefinitely.[22] An arrangement of memory cells with logic circuits creates sequential logic functions.[23] One common arrangement is a Random Access Memory (RAM).[24] Another common arrangement is the electronic brain of most desktop computers, the microprocessor.[25]

Complex manufacturing processes combine microminiature electronic components on a single monolithic chip.[26] This chip, or integrated circuit, may contain as many as 200,000 components[27] on a square as small as a quarter inch per side.[28] The process builds up the integrated circuit components one layer at a time, on a base of semiconductor material such as silicon.[29] Each step adds material onto previous layers or etches away some of the previously deposited material.[30] A mask acts as stencil, defining the pattern for material deposition or removal.[31] As a result, these mask images provide key information concerning integrated circuit manufacture.[32] A typical ASIC might employ twelve or more masks.[33]

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20. *See* HOROWITZ & HILL, *supra* note 18, at 316-21.

21. *See id.* at 331-37.

22. *Id.* at 341, 454.

23. *Id.* at 362-70.

24. A RAM retains binary patterns until rewritten or power removal. PAUL HOROWITZ & WINFIELD HILL, THE ART OF ELECTRONICS 354-56 (1980).

25. *Id.* at 484.

26. H.R. REP., No. 781, 98th Cong., 2d Sess. 2-3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5750-52.

27. Alan B. Grebene et. al., *Integrated Circuits and Microprocessors, in* ELECTRONIC ENGINEERS' HANDBOOK 8-2 (Donald G. Fink & Donald Christiansen eds., 1989).

28. H.R. REP., No. 781 at 13; Richard E. Matick et. al., *Electronic Data Processing, in* ELECTRONIC ENGINEERS' HANDBOOK 23-4 (Donald G. Fink & Donald Christiansen eds., 1989).

29. H.R. REP., No. 781 at 12-14; Alan B. Grebene et. al., *Integrated Circuits and Microprocessors, in* ELECTRONIC ENGINEERS' HANDBOOK 8-3 to 8-19 (Donald G. Fink & Donald Christiansen eds., 1989).

30. *Id.*

31. Alan B. Grebene et. al., *Integrated Circuits and Microprocessors, in* ELECTRONIC ENGINEERS' HANDBOOK 8-3 to 8-19 (Donald G. Fink & Donald Christiansen eds., 1989). *See* Joseph Montalbo, *ASIC Manufacturing, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 194-96 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

32. *Id.*

33. Joseph Montalbo, *ASIC Manufacturing, in* APPLICATION SPECIFIC INTEGRATED

The final product resembles an aerial photograph of an urban area with a grid-like street pattern.

B. Software

An overview of software also provides background necessary to frame ASIC legal issues. The Copyright Act[34] defines software or a "computer program" as a "set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[35] Usually, a programmer composes software or source code from a high-level computer language such as BASIC, FORTRAN, or PASCAL.[36] A computer language contains the instruction formats, data structures, and the rules of syntax necessary to construct a useful program. High-level languages provide the most intelligible, human-readable form of software.[37] In contrast, when the programmer needs direct control over computer processing, a computer-specific assembly language is used.[38] This low-level source code is more cryptic and tedious, but is still intelligible to one trained in the given language.[39]

In order for the computer to execute a program it requires translation into machine language.[40] Machine language, or object code, contains the sequences of "1s" and "0s" needed to trigger the computers sequential logic functions.[41] Consequently, object code is impractical for human comprehension, but is the usual form for commercial distribution. An assembler program translates an assembly program into machine language. This translation is straightforward because each assembly language instruction corresponds to a unique object code sequence.[42]

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33. Joseph Montalbo, *ASIC Manufacturing*, *in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 194-96 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

34. Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1988)).

35. 17 U.S.C. § 101 (1988).

36. *See* Richard E. Matick Et. Al., *Electronic Data Processing, in* ELECTRONIC ENGINEERS' HANDBOOK 23-83 to 23-86 (Donald G. Fink & Donald Christiansen eds., 1989); ARTHUR B. PYSTER, COMPILER DESIGN AND CONSTRUCTION 3-4 (1980). *See also,* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1243 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

37. PYSTER, *supra* note 36, at 3-4 (1980).

38. *Id.* at 3.

39. *See* PAUL HOROWITZ & WINFIELD HILL, THE ART OF ELECTRONICS 472, 487-97 (1980). *See also, Apple*, 714 F.2d at 1243.

40. PYSTER, *supra* note 36, at 3 (1980). *See also, Apple*, 714 F.2d at 1243.

41. *Apple*, 714 F.2d at 1243. *See* PYSTER, *supra* note 36, at 3.

42. HOROWITZ & HILL, *supra* note 18, at 472.

In contrast, transformation of a high-level language requires a compiler program.[43] A compiler translates the high-level language into intermediate assembly language form.[44] This process may expand the number of instructions and optimize certain aspects of the software.[45] This enhancement may alter the structure or sequence originally contained in the high-level source code.[46] The final step assembles this intermediate form into object code.[47] Thus, the sequence and organization of an object code from a high-level language is less similar to the original code than the object code from a low-level language.

In addition to language level, the categorical purpose of programs vary. The most direct program is the application program, which performs tasks such as bookkeeping and word processing under specific directions from the operator.[48] A less direct program is an operating system program, which specifies the internal operations of the computer system.[49] DOS is a common operating system program. Typically, user control over this type of program is limited.[50] Even more remote is computer microcode. Microcode usually refers to a special code permanently embedded in a computer. This code generates one or more binary operations inside a computer microprocessor for each object code instruction received.[51]

C. The Hardware-Software Hybrid: Application Specific Integrated Circuits (ASICs)

ASICs cut across traditional hardware-software and logic-memory definitions.[52] Broadly defined, ASICs are composed of three categories: (1) full custom, (2) semi-custom, and (3) Programmable Logic Devices (PLDs).[53] These devices can be linear, digital, or both.[54] The purchaser

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43. *Id.* at 472-3.

44. *See* PYSTER, *supra* note 36, at 3.

45. *Id.* at 17-19.

46. *Id.*

47. *Id.*

48. *See e.g.*, Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1243-44 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

49. *Id.*

50. *Id.*

51. *See*, Tracy L. Hurt, *NEC v. Intel: Copyright and the Mysteries of Embedded Microcode*, 29 JURIMETRICS J. 313, 314 (1989); Robert Steinberg, *NEC v. Intel: The Battle Over Copyright Protection For Microcode*, 27 JURIMETRICS J. 173, 177-79 (1987).

52. For an explanation concerning the hybrid nature of ASICs, *see supra* notes 7-9 and accompanying text.

53. *See* LALA, *supra* note 6, at 2-4.

54. *See* James Rowson, *Computer-Aided Design Tools and Systems, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 161-64 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991). *See also*, PAUL M. BROWN, A GUIDE TO ANALOG ASICs 1-6 (1992).

of a full-custom ASIC specifies the entire device design.[55] Semicustom ASICs, called gate arrays, contain vast numbers of sequential logic building blocks or *cells* which are connected according to the purchaser's specifications.[56] Another type of semicustom ASIC is a macrocell design. These are personalized by connecting pre-defined cell groups selected from an ASIC vendor's macrocell library.[57] Programming both full-custom and semicustom designs is possible using a hardware description language.[58] A computer graphic logic diagram may also serve as an input for personalization.[59] The selected source data provide direction to the dedicated equipment, creating the masks for the final personalized integrated circuit layers.[60]

The last category of ASICs are PLDs. The common arrangements of logic gates and memory cells contained in PLDs result in the highest degree of pre-definition and the simplest customization process.[61] Initially, a small fuse connects each gate and memory cell in a fuse-link interconnection chip layer. This overload of connections renders the device useless. However, equipment transforms user-specified software or graphic representations of the desired circuit into electric signals. These signals blow fuses to remove unwanted connections. The remaining fuse-link connections implement the desired electronic function.[62] Among the most common fused-link devices are programmable read only memories (PROMs or ROMs), field programmable logic arrays (FPLAs) and programmable array logic (PAL).[63]

PROM or ROM is one of the best known device types. This PLD effectively contains a memory cell corresponding to each fuse. When a fuse is blown, the cell changes its binary state (such as from a "1" to a "0").[64] Thus, a ROM retains a readable "memory" pattern of "1s"

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55. LALA, *supra* note 6, at 2.

56. *See* Jeffrey L. Hilbert, *Introduction to ASIC Technology, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 2-5 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

57. A cell library contains representations of desirable custom functions available for incorporation in the vendor's ASIC. *Id.* at 3; LALA, *supra* note 6, at 3.

58. Ronald Collett, *Market Dynamics of the ASIC Revolution, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 22-23 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

59. *Id.* at 10, 22-23.

60. *See id. See also*, James Rowson, *Computer-Aided Design Tools and Systems, in* APPLICATION SPECIFIC INTEGRATED CIRCUIT (ASIC) TECHNOLOGY 127-34, 140, 148, 154-57, 166-67, 171 (Norman G. Einsruch & Jeffrey L. Hilbert eds., 1991).

61. *See* LALA, *supra* note 6, at 2-4.

62. *Id.* at 13.

63. *Id.* at 3-10 (1990).

64. Unlike a RAM, a ROM retains the memory pattern despite power removal. Alternatively, one can model a ROM as a logic device. *Id.* at 21-25.

and "0s" corresponding to which fuses are blown. FPLA and PAL personalization also result from selected removal of fuse connections. However, FPLA and PAL connection patterns facilitate logic-memory functions other than permanent memory.[65] A custom interconnecting mask layer may serve as a substitute for the fuse-link layer. A high volume of devices with the same connection pattern economically dictates this substitution.[66]

The personalization process for most ASICs is permanent, but recent technology resulted in erasable ASICs.[67] These devices are reusable, easier to test, and save chip space by replacing fuses with smaller electronic connections.[68] Their sophistication parallels that of simple gate arrays.[69] The two types of erasable ASICs are those erased by exposure to ultraviolet light and those electrically erased. However, their utility is limited.[70] Finally, because the connections of erasable ASICs are purely electronic,[71] no corresponding mask exists.

D. How Reverse Engineering Makes Duplication by Competitors Possible

Commonly available forms of software and hardware are object code and integrated circuits. Neither form contains a directly ascertainable description of how the product works. Frequently, developers try to decompose a product into functional elements to enhance their knowledge and incorporate improvements. This reverse engineering process varies depending on the product under inspection. In software, reverse engineering breaks object code into more discernable intermediate assembly language.[72] However, because of modifications during compilation, reconstitution of a high-level language is not possible.[73] Similarly, chip

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65. *See* LALA, *supra* note 6, at 4-7, 47, 53, 116, 124.

66. *Id.* at 22.

67. *Id.* at 167-68.

68. *Id.*

69. *Id.* at 167-69, 178, 186-87, 200-01, 242-243. *See* Dave Burskey, *Denser, Faster FPGAs vie for Gate-Array Applications*, ELECTRONIC DESIGN, May 27, 1993, at 55 (discussing the growing market for electrically erasable gate arrays).

70. Ultraviolet erasure requires an expensive quartz window in the integrated circuit package. Typical electrically erasable devices can be rewritten about 10,000 times and will typically retain data for about 10 years. LALA, *supra* note 6, at 23-24.

71. *Id.* at 23-24, 167-68.

72. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1514-15 (9th Cir. 1992); Atari Games Corp. v. Nintendo of Am., Inc., 975 F.2d 832, 843-44 (Fed. Cir. 1992); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268-69 (5th Cir. 1988).

73. For an explanation of the compilation process, see *supra* notes 42-45 and accompanying text.

peeling entails the dissection of an integrated circuit layer by layer, revealing the materials and patterns necessary to reproduce integrated circuit masks.[74] However, the expense and incompatibility of related processes limit the effectiveness of this method.[75]

Both methods find application in a clean-room procedure.[76] For this procedure, one group "reverse engineers" a competitor's product and records the functional aspects. A second group, isolated from the product, takes this written specification and attempts to create a compatible product from it.[77] The legality of reverse engineering and the clean-room duplication process are considered in Part III.

II. Relevant Federal Law

The congressional authority to extend intellectual property protection to hardware and software arises from the Copyright and Patent clause of the United States Constitution.[78] Software protection arguably arose with the 1976 reenactment of the Copyright Act,[79] which accounted for contemporary technological advances.[80] A 1980 amendment removed all doubt concerning the copyrightability of software by adding the definition of "computer program" and by curtailing the exclusive rights for computer program copyright owners.[81] In contrast, the SCPA protection of integrated circuits through mask works is explicit.[82] Before considering the protection these statutes offer ASICs, this Note examines the strongest form of federal intellectual property protection—patent law.[83]

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74. *See e.g., Atari*, 975 F.2d at 836.

75. John G. Rauch, *The Realities of Our Times: The Semiconductor Chip Protection Act of 1984 and the Evolution of the Semiconductor Industry*, 75 J. Pat. & Trademark Off. Soc'y 114-16 (1993).

76. *See Sega*, 977 F.2d at 1514-15, 1525-26.

77. *Id.*

78. The clause grants congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

79. Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1988)).

80. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1247 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

81. Act of December 12, 1980, Pub. L. No. 96-517 §10, 94 Stat. 3015, 3028 (codified at 17 U.S.C. §§ 101, 117 (1988)). *See Apple*, 714 F.2d at 1248.

82. 17 U.S.C. § 902 (1988).

83. *See* Patent Act, 35 U.S.C. §§ 101-376 (1988). The protection offered by a patent is broader and more certain than copyright. R. Lewis Gable & J. Bradford Leaheey, *The Strength of Patent Protection for Computer Products: The Federal Circuit and the Patent Office Refine the Test for Determining which Computer-related inventions Constitute Patentable Subject Matter*, 17 Rutgers Computer & Tech. L.J. 87, 87-89 (1991).

A. Why Patent Law Will Not Categorically Protect ASICs

Patents for hardware and software are available for ASICs on a narrow case-by-case basis, but the high standards of novelty[84] and nonobviousness[85] make categorical patent protection of ASICs unlikely.[86] Only patents for highly innovative electronic hardware are available.[87] Software patentability arguably depends on incorporation in an invention that satisfies the requirements of the Patent Act, irrespective of the particular software involved.[88] Consequently, an ASIC is not patentable unless it embodies a patentable hardware or software invention. In contrast, the potential for uniform coverage under the Copyright Act and the SCPA is greater.

B. Copyrights

A copyright holder obtains the exclusive right to reproduce and distribute copies of a protected work for commercial purposes.[89] The term of a copyright is at least fifty years.[90] Despite this broad protection, coverage is thin because it only extends to the expression of a work and not the underlying idea.[91] This expression element is in tension with the largely utilitarian nature of technological works. ASICs are not immune to this tension triggered first by the questions of whether ASICs are a proper subject for copyright, and second, by the unsettled nature of the software infringement test which probes the scope of that pro-

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84. 35 U.S.C. § 102.

85. *Id.* § 103.

86. *Cf.* Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1562-63 (Fed. Cir. 1992) ("[S]ome original circuitry may be patentable . . . [but] . . . Congress sought more expeditious protection [SCPA] against copying of original circuit layouts, whether or not they met the criteria of [a] patentable invention.").

87. *See Brooktree*, 977 F.2d at 1573, 1575, 1577 (upholding three patent claims concerning a video display chip); Intel Corp. v. U.S. Int'l Trade Comm'n, 946 F.2d 821, 831 (Fed. Cir. 1991) (involving patents in EPROM circuitry); In Re Mulder, 716 F.2d 1542, 1549 (Fed. Cir. 1983) (rejecting as obvious a patent on a particular gate array layout).

88. *See* Nelson R. Capes, *Current Status of Patent Protection for Computer Software,* 74 J. PAT. & TRADEMARK OFF. SOC'Y 5 (1992). *Cf.* Arrythmia Research Technology, Inc. v. Corazonix Corp., 958 F.2d 1053, 1055 (Fed. Cir. 1992) (upholding patent which incorporates an algorithmic process specified as performable by a computer program or by dedicated hardware).

89. 17 U.S.C. § 106 (1988).

90. In the case of ownership by a named author protection lasts for the life of the author plus 50 years, but for anonymous or institutional owners, the protection lasts 75 years from registration or 100 years from creation, whichever is shorter. *Id.* §§ 301-03.

91. *Id.* § 102.

tection. In addition, the question of reverse engineering as a "fair use" of a copyrighted work affects the scope of copyright for ASICs.

1. Copyright Subject Matter.—The first question is whether ASICs are a proper subject for copyright protection. The Copyright Act provides that "[c]opyright protection subsists in original works of authorship fixed in any tangible medium of expression . . . ."[92] Also, it excludes from coverage "any idea, procedure, process, system, method of operation, concept, principle or discovery . . . ."[93] Thus, the subject matter test becomes: (1) whether the work is original, (2) whether the work is fixed in a tangible medium, and (3) whether the work is excluded as utterly utilitarian. Winnowing protected expression from the unprotected idea of a work could be considered part of the subject matter test. However, because this separation is an integral part of determining infringement, the expression—idea dichotomy is considered as part of the infringement test.[94]

(a) Categorical protection.—In addition to providing the basic elements of copyrightable subject matter, the Copyright Act lists eight categories of protected works,[95] but the list is not exclusive.[96] Unlisted works arising from new technology have a good chance at protection through judicial extension, but works previously rejected probably require legislative inclusion.[97] Software remains unlisted. Nonetheless, since the 1980 amendment,[98] copyright protection of high level application programs as a literary work is well-settled.[99] There have been extensions of protection to flowcharts;[100] user interfaces;[101] screen outputs;[102] and the

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92. *Id.* § 102(a).

93. *Id.* § 102(b).

94. *See* 1 MELLVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[D] (perm. ed. rev. vol. 1992) [hereinafter NIMMER & NIMMER].

95. Literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and audiovisual works; sound recordings; and architectural works are all expressly protected. 17 U.S.C.A. § 102(a).

96. H.R. REP. No. 1476, 94th Cong., 2d Sess. 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664.

97. 1 NIMMER & NIMMER, *supra* note 94, § 2.03[A].

98. For a discussion of this amendment, *see supra* note 81 and accompanying text.

99. *E.g.*, Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1233-34 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

100. Eng'g Dynamics, Inc. v. Structural Software, Inc., 785 F. Supp. 576, 583 (E.D. La. 1991); Lotus Dev. Corp. v. Paperback Software Intern., 740 F. Supp. 37, 43 (D. Mass. 1990).

101. Lotus Dev. Corp. v. Borland Intern., Inc., 788 F. Supp. 78, 82 (D. Mass. 1992).

102. *See e.g.*, Digital Communications Assocs., Inc. v. Softklone Distrib. Corp., 659 F. Supp. 449, 462-463 (N.D. Ga. 1987).

non-literal structure, sequence, and organization of computer programs.[103] Conversely, the pervasive utility of an integrated circuit mask work can arguably lead to the conclusion that mask works are not copyrightable per se.[104] This conclusion was one of the reasons for enactment of the SCPA.[105] Thus, the ASIC copyright issue narrows to whether the device is an embodiment of protected software.

(b) A starting point: how copyright law subject-matter standards have applied to integrated circuit components.—Prior software copyright decisions concerning integrated circuits provide a springboard for application of the subject matter test to ASICs. Protection of hardware customized by software began with infringement cases involving audio-visual copyrights in video game displays.[106] In these cases, the display image resulted from object code embedded in ROMs in the video game console.[107] Relying on the video game decisions, a landmark case, *Apple Computer, Inc. v. Franklin Computer Corp.*[108] definitively protected a ROM as a vehicle for software copyrighted as a literary work.[109] In this case, Apple Computer sought a preliminary injunction to enjoin Franklin Computer's infringement of copyrighted programs. These programs included the object code version of operating system software embedded on ROMs. Franklin admitted the copying, but maintained the programs were not copyrightable. The court held that object code is copyrightable, despite the inability to readily read it, and despite the utilitarian nature of a ROM media.[110] Furthermore, the utilitarian nature of an operating system program did not defeat protection.[111] Other circuits embraced the *Apple Computer* holdings.[112] Consequently, the copyright protection of a ROM as a software media is well established.

Another heralded case is *NEC Corp. v. Intel Electronics, Inc.*[113] In this case, NEC sought a declaratory judgement regarding infringement

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103. *Whelan*, 797 F.2d at 1248.

104. *See* H. R. Rep No. 781, 98th Cong., 2d Sess. 3-6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5752-53. *But see* 3 NIMMER & NIMMER, *supra* note 94, § 18.11[B].

105. *See* H. R. Rep No. 781, at 3-4.

106. *See e.g.*, Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855-56 (2d Cir. 1982); Williams Elec., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982).

107. *Stern*, 669 F.2d at 854; *Williams*, 685 F.2d at 871-72.

108. 714 F.2d 1240, 1249 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

109. *Id.*

110. *Id.*

111. *Id.* at 1253-54.

112. *See* Cable/Home Communication Corp., v. Network Prod., Inc., 902 F.2d 829, 843 (11th Cir. 1990); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1233-34 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987). *But see* Data Cash Sys., Inc. v. JS & A Group, Inc., 480 F. Supp. 1063, 1066-67 (N.D. Ill. 1979), *aff'd on other grounds*, 628 F.2d 1038 (7th Cir. 1980) (holding against copyright protection of object code prior to effectivity of Copyright Act of 1976).

113. The initial findings were reported in NEC Corp. v. Intel Corp., 645 F. Supp.

of Intel's microcode copyright.[114] In both published and unpublished decisions, the district court found the microcode copyrightable in spite of highly utilitarian material inherent in microcode.[115] However, the unpublished decision analyzed the degree of similarity and determined that NEC did not infringe the copyright.[116] Although it lacks precedential value, this case supports the likelihood that courts will extend copyright coverage beyond ROMs to other ASICs.

Both the *Apple Computer*[117] and *NEC*[118] courts found persuasive arguments in the final report of the National Commission On New Technological Uses of copyrighted works ("CONTU report").[119] The 1980 amendment of the Copyright Act adopted the recommendations of this commission.[120] As a result, courts treat this report as a comprehensive legislative history for the amendment.[121]

(c) Originality.—The first inquiry is whether ASICs satisfy the originality requirement. Originality requires only that the author did not copy the work from another and that the work possess "some minimal degree of creativity."[122] Minimal creativity must exceed mere independent effort, but any objective amount will do.[123] The CONTU report condones this traditional approach for software.[124] Originality poses little problem

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590 (N.D. Cal. 1986). However, the judge recused himself so the initial decision was vacated as moot at 835 F.2d 1546 (9th cir. 1988). On retrial, an unpublished decision was reported in No. C-84-20799-WPG, 1989 WL 67434 (N.D. Cal. 1989). *See also*, Tracy L. Hurt, *NEC v. Intel: Copyright and the Mysteries of Embedded Microcode*, 29 JURIMETRICS J. 313 (1989); Robert Steinberg, *NEC v. Intel: The Battle Over Copyright Protection For Microcode*, 27 JURIMETRICS J. 173 (1987).

114. For an explanation of microcode, *see supra* note 51 and accompanying text.

115. 645 F. Supp. at 595; 1989 WL 67434, at *3. See also Intel Corp. v. Advanced Micro Devices, Inc., No. C-90-20237-WAI, 1993 WL 135953, at *1 (N.D. Cal. April 15, 1993) (implicitly acknowledging the copyrightability of microcode).

116. NEC Corp. v. Intel Corp., No. C-84-20799-WPG, 1989 WL 67434, at *17 (S.D. Cal. 1989).

117. 714 F.2d at 1247.

118. 1989 WL 67434, at *2.

119. The commission resulted from Pub. L. 93-573, § 201, 88 Stat. 1873 (1974).

120. *Compare* NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REP, 12 (1979) [hereinafter CONTU REPORT] *with* Act of December 12, 1980, Pub. L. 96-517, § 10, 94 Stat. 3015, 3028 (adding definition of computer program to 17 U.S.C. § 101 (1988) and modifying 17 U.S.C. § 117 (1988)).

121. *But see* Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1241-42 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (refuting arguments stemming from CONTU REPORT).

122. Feist Publications, Inc. v. Rural Tel. Serv. Co., 111 S. Ct. 1282, 1287 (1991) (citing 1 NIMMER & NIMMER § 2.01); Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 301 (9th Cir. 1965).

123. *Feist*, 111 S. Ct. at 1289.

124. CONTU REPORT, *supra* note 120, at 18, 20.

in software cases including those protecting ROMs.[125] Likewise, other ASICs should satisfy the originality requirement. However, two problem areas may arise under certain circumstances.

First, short sentence fragments and phrases may fail the originality requirement.[126] The programs customizing some ASICs may involve terse and redundant statements, especially in simpler devices such as PALs and PLAs. In *NEC*, the court acknowledged the limit, but even the smallest subroutines of the microcode survived because the originality inquiry considered the work as a whole.[127] Nonetheless, one district court found that a minor variation in a binary protocol for facsimile machine communications lacked originality.[128]

Most ASICs are highly customized devices, so applications expressed in short program fragments are unlikely. If the software definition of a device is so simple that it faces a serious originality challenge, then it is unlikely to merit any attention by the industry.

A second area where originality comes into question is when the work is compiled or derived from another work. Copyright protection for a compilation[129] or derivative work[130] only extends to the author's material contributions to the work.[131] In *Feist Publications, Inc. v. Rural Telephone Service Co.*,[132] the Supreme Court held that uncopyrightable facts arranged in an original way can be copyrighted as a compilation.[133] However, the Court further held that the arrangement of names and telephone numbers in a phone book lacked the requisite originality.[134] The customization of macrocell ASICs is mainly an arrangement of selected modules from a vendor's cell library. Similarly, many specifi-

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125. M. Kramer Mfg. Co., Inc. v. Andrews, 783 F.2d 421, 438 (4th Cir. 1986); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1246 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

126. *See*, Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 301 (9th Cir. 1965); 1 NIMMER & NIMMER, *supra* note 94, § 2.01[B].

127. NEC Corp. v. Intel Corp., No. C-84-20799-WPG, 1989 WL 67434, at *2 (N.D. Cal. 1989).

128. Secure Servs. Technology v. Time and Space Processing, 722 F. Supp. 1354, 1363 (E.D. Va. 1989).

129. "A 'compilation' is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1988).

130. "A 'derivative work' is a work based upon one or more preexisting works, such as a translation . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adopted." *Id.* § 101.

131. *Id.* § 103.

132. 111 S. Ct. 1282 (1991).

133. *Id.* at 1289.

134. *Id.* at 1297.

cation programs are arrangements of preexisting material. Nonetheless, even a slight "creative spark" in the arrangement offers the necessary originality.[135] So not only ROMs, but all ASICs characterized as compilations or derivations of prior works appear to survive the originality element if some creative aspect exists.

(d) Fixation.—The second copyright element is the identification of ASICs as a tangible media in which the work is fixed. "Fixed" means a media stable enough to permit communication of the work for "more than transitory duration."[136] As a software vehicle, ROMs meet the fixation requirement, including erasable varieties.[137] Similarly, other ASICs appear to provide sufficiently fixed media for the purposes of copyright.

The tangibility aspect of a work requires it to "be perceived, reproduced or communicated, either directly or with the aid of a machine or device."[138] In considering what constitutes a software copy, the CONTU report emphasizes the one-to-one correspondence between physical representations of code on a magnetic tape and the human-readable copy.[139] This commentary implicitly suggests that some degree of correlation is necessary. Because compilation modifies the structure of a high-level source code, reconstruction of the source code through disassembly is not possible.[140] However, even in the absence of a strict correlation, some level of structure and organization is probably discernable through disassembly. The current protection of object code, including ROMs, suggests this imperfect correlation of high-level source code to object code will still satisfy the second prong of the tangible media element.

The correlation argument is made against ASICs other than ROMs.[141] Except for ROMs, disassembly of ASICs does not yield a detailed expressive code. However, chip peeling might yield some organizational features traceable to the initial source code or computer graphic diagram, revealing a limited ability to perceive, reproduce or communicate the originating ASIC software.[142] Nonetheless, the detail of any information

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135. *Id.* at 1294.

136. 17 U.S.C. § 101 (1988).

137. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1243 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984); E. F. Johnson Co. v. Uniden Corp., 623 F. Supp. 1485, 1490 (D. Minn. 1985).

138. 17 U.S.C. § 102(a).

139. CONTU REPORT, *supra* note 120, at 22.

140. For an explanation of the compilation process, *see supra* notes 42-45 and accompanying text.

141. *See* Gerard V. Curtin, Jr., Comment, *The Basics of ASICs: Protection for Semiconductor Mask Works in Japan and the United States*, 15 B.C. INT'L & COMP. L. REV. 113, 134 (1992).

142. For an explanation of chip peeling, *see supra* notes 73-75 and accompanying text.

surviving this transformation is unlikely to reach the degree of correlation that exists between object code and assembly instructions. Ultimately, the sufficiency of the correlation depends on whether "expression" as well as "idea" survived the transformation. Thus, this determination should default to the case-by-case infringement examination below.[143] Finally, requiring a strict correlation creates friction with the current protection of object code vehicles. Upsetting this protection contravenes the original intent of the legislature.[144]

(e) Utility.—The final test is whether the utilitarian nature of ASICs prohibits protection. This problem arises when the intended use of a copyrighted work requires copying the work.[145] In *Baker v. Selden*,[146] the Supreme Court denied protection to bookkeeping forms in a copyrighted book because the application of the teachings of the book required use of the forms.[147] This "useful article" doctrine expanded to forbid protection of any form.[148] Later cases narrowed the *Baker* holding,[149] and Congress appeared to codify this narrow interpretation in the Copyright Act by only prohibiting protection of utilitarian aspects of the work.[150]

A comparison with other categories of work challenged by the utility element reveal the impact on ASICs. The first category considered is software.

In *Apple Computer*, this challenge arose with respect to the copyrightability of operating system programs. The court held that although protection does not extend to the process underlying an operating system program, the utilitarian nature of the software does not bar protection when the work otherwise satisfies subject matter requirements.[151] Similarly, the majority in the CONTU report stated that utilitarian aspects of a computer program should not bar copyright protection.[152] Thus, neither the broad interpretation of *Baker* nor the useful nature of software prevent protection. Similarly, the primary use of an ASIC as a software vessel satisfies this element.

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143. For a discussion of the role of expression in infringement inquiries, *see supra* note 94 and accompanying text.

144. CONTU REPORT, *supra* note 120, at 22.

145. *See* 1 NIMMER & NIMMER, *supra* note 94, § 2.18[A].

146. 101 U.S. 99, 103 (1879).

147. *Id.*

148. 1 NIMMER & NIMMER, *supra* note 94, § 2.18[B][1].

149. *See e.g.*, Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1251-52 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984) (citing 1 NIMMER & NIMMER § 2.18[D] and arguing that Mazer v. Stein, 347 U.S. 201 (1954) curtailed reading of *Baker* to withdrawal of protection from the underlying idea only).

150. *See* 17 U.S.C. § 102(b) (1988).

151. *Apple Computer*, 714 F.2d at 1251-52.

152. CONTU REPORT at 21.

Except for ROMs, the software character of a personalized ASIC is highly remote because the primary goal is a custom electronic device rather than computer instruction. Moreover, the ASIC may even become part of a machine executing software. The CONTU report suggests a limit, stating: "[t]he movement of electrons through wires and components of a computer is precisely that process over which copyright has no control. . . . [A]nyone is free to make a computer to carry out any unpatented process. . . ."[153] Thus, the unprotected functional aspects of an ASIC necessarily receive no protection, despite software origins. In contrast, the easy alternate characterization of a ROM as a logic device, instead of memory,[154] makes inconsistent legal results likely if the rules rely on technical distinctions between logic and memory.[155] Also, although the primary function of ASICs is more utilitarian than a protected ROM, the complete absence of expression does not follow. Consequently, this tenuous expression is best left to the infringement test for proper sorting.

Another analogous area concerns the protection of three-dimensional objects represented by drawings or illustrations. A copyrighted drawing does not protect the corresponding three-dimensional object.[156] In the past, a copyright of an architectural plan did not extend protection to the corresponding building with utilitarian features.[157] Similarly, copyrighted graphic or mask work representations of the three-dimensional characteristics of an ASIC may not protect it. However, the United States' accession to the international Berne Convention[158] resulted in the addition of architectural works as the eighth expressly listed work.[159] This addition broadens categorical protection and leaves room for expansion of coverage to favored areas such as new technological works.[160] Hence, this addition supports ASICs as an interstitial addition to copyright subject matter.

Copyright office regulations do not extend copyright protection to the ingredient lists of recipes.[161] An ASIC resembles a recipe because

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153. *Id.* at 22.

154. *See supra* note 64 and accompanying text.

155. *See* Mark A. Hollingsworth, *Is the Medium the Message? Extending Copyright Protection to Logic Devices*, 12 WHITTIER L. REV. 383 (1991) (arguing for extension of copyright protection to computer integrated circuits); Glynn S. Lunney, Jr., Note, *Copyright Protection for ASIC Gate Configurations: PLDs, Custom and Semicustom Chips*, 42 STAN. L. REV. 163 (1989) (arguing for extension of copyright to ASICs).

156. *See* 1 NIMMER & NIMMER, *supra* note 94, § 2.18[H][2].

157. *E.g.*, Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972).

158. 1 NIMMER & NIMMER, *supra* note 94, § 2.20.

159. Architectural Works Copyright Protection Act in 1990, Pub. L. 101-650, 104 Stat. 5089.

160. *See supra* notes 95-103 and accompanying text.

161. 37 C.F.R. § 202.1(a) (1991). Some cases have opposed this regulation, but these decisions are criticized. *See* 1 NIMMER & NIMMER, *supra* note 94, § 2.18[I].

personalization software provides the ingredients to make an electronic device. In contrast, a personalized ASIC involves alternate choices and complex arrangements, not just a simple list of ingredients. Thus, the recipe rule may not deny protection to ASICs.

Another comparative aspect of ASICs is the potential for overlapping protection methods. Video games often entangle two types of works embedded on a ROM: (1) computer programs as literary works and (2) video displays as audiovisual works.[162] For such dualistic works, copying of the computer program often results in infringement of both copyrights.[163] However, copying the video display does not infringe both because several different programs can result in the same audiovisual display.[164] Similarly a personalized ASIC is a transformation of an independently copyrightable computer program or graphic representation. Concurrently, an ASIC mask work warrants SCPA protection.[165] Also, like a video game ROM, the ASIC itself is an uncopyrightable mechanical device.[166] Although not directly analogous, the dual copyright protection afforded video games blazes the trail for concurrent methods of ASIC technology protection.

These subject matter comparisons do not reveal any strong challenges to ASIC copyright protection. In contrast, the low degree of correlation between ASICs and originating software, as well as the pervasive utility of the devices, persist as formidable subject matter threats. The absence of a categorical exclusion of expression under the subject matter examination weakens this threat. As a result, a case-by-case examination for infringement is likely to arise for most ASIC challenges.

2. Copyright Infringement: The Substantial Similarity Test.—An infringement action turns on whether the plaintiff owns the copyright and whether the defendant copied the work.[167] When copying is absent, no action in infringement exists—even if the independently created works are identical.[168] The software/ASIC analogy used in subject matter anal-

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162. *See e.g.*, Williams Elecs., Inc v. Artic Int'l, Inc., 685 F.2d 870, 875 (3d Cir. 1982); 1 NIMMER & NIMMER, *supra* note 94, § 2.18[H][3][b].

163. Only one registration is required for both the literary and audiovisual aspects of a computer program. 37 C.F.R. § 202.3(b)(3)-(b)(6) (codification of 53 Fed. Reg. 21,817 (1988)).

164. *See e.g.*, Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982); 1 NIMMER & NIMMER, *supra* note 94, § 2.18[H][3][b].

165. 17 U.S.C. § 902 (1988). For discussion of mask works, *see supra* notes 102-03 and accompanying text.

166. For discussion of mechanical devices *see* 1 NIMMER & NIMMER, *supra* note 94, § 2.18[F].

167. *E.g.*, Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1231 (3d Cir 1986), *cert. denied*, 479 U.S. 1031 (1987).

168. 3 NIMMER & NIMMER, *supra* note 94, § 13.01[B].

ysis carries over to infringement inquiries. Software infringement is usually circumstantial. Consequently, the defendant's access to the plaintiff's work, plus substantial similarity to the plaintiff's work, raises an inference of copying.[169] Defendants typically concede access, so only the issue of substantial similarity remains.[170] Also, substantial similarity analysis arises from a challenge to the existence of protected expression, even when verbatim copying is admitted.[171] Thus, this test embodies the expression—idea dichotomy codified in the Copyright Act.[172]

Presently, the substantial similarity test for software copyrights is splintered across the circuits. An initial analysis of common expression—limiting doctrines enhances the subsequent analysis of this split of authority. The doctrines are (1) exclusion of borrowed expression, (2) merger, and (3) *scenes a faire*. These doctrines often straddle "subject matter" and "substantial similarity" inquiries.[173]

(a) Expression limiting doctrines: borowed expression, merger, and scenes a faire.—To the extent a work results from material or facts borrowed from the public domain, it is unprotected.[174] In addition, expression from copyrighted works is not protected if licensed for use in a compilation or derivative work.[175] Frequently, computer programmers borrow routines from public sources.[176] Thus, original software often contains public domain fragments. Similarly, ASIC programmers rely on available routines including vendor cell libraries and subroutines. The expressions in ASICs traceable to these borrowed sources is not protected.

Merger denies copyright protection to any idea capable of expression in only one way. It sets the scope of protection in direct proportion to the number of different methods available to convey an idea.[177] For software, maximum efficiency with respect to speed and size of a program

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169. *Whelan*, 797 F.2d at 1231-32.

170. *Id.* at 1232.

171. 3 NIMMER & NIMMER, *supra* note 94, § 13.01[B].

172. *Compare* "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a) (1988), *with* "In no case does copyright protection . . . extend to any idea . . . ." *Id.* § 102(b).

173. For a discussion concerning the overlap of subject matter and infringement tests, *see supra* notes 93-94 and accompanying text.

174. *E.g.*, 3 NIMMER & NIMMER, *supra* note 94, § 13.03[F][4]. *See also, Whelan*, 797 F.2d at 1236.

175. *E.g.*, 3 NIMMER & NIMMER, *supra* note 94, § 13.03[F][4]. *See also*, 17 U.S.C. § 103 (1988).

176. 3 NIMMER & NIMMER, *supra* note 94, § 13.03[F][4].

177. Computer Assocs. Int'l, Inc. v. Altai, Inc, 982 F.2d 693, 708 (2d Cir. 1992); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984). *See also*, Brown Bag Software, Inc. v. Symantec, Corp., 960 F.2d 1465, 1476 (9th Cir. 1992); Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1236 (3d Cir 1986), *cert. denied*, 479 U.S. 1031 (1987).

is such an expression-limiting idea.[178] In *Apple Computer*, the court confronted merger in connection with the utility and efficiency goals central to an operating system program, but held that a sufficient number of methods existed to avoid triggering the doctrine of merger.[179] In contrast, the *NEC* court found the small number of instructions needed to perform some of the simpler microcode subroutines narrowed protection to verbatim copying only.[180] ASIC creators share these efficiency concerns regarding the density of functions on a chip, power consumption and similar technical performance criteria.[181] In the case of large, full-custom and semicustom ASICs the usual code is complex, allowing alternative modes of expression, at least in terms of software organization. In contrast, short routines common to simpler PLDs result in fewer expressive modes which narrow protection.

A similar limiting doctrine is *scenes a faire*. For literary works, the doctrine "denies copyright protection to those elements that follow naturally from the work's theme rather than from the author's creativity."[182] For computer programs, this doctrine prevents copyright protection of expressive modes required by external constraints inherent in the hardware and software.[183] In *NEC*, these constraints became a key issue because object code instructions and microprocessor hardware confine the microcode tasked with translating between them.[184] For ASICs, the limitation increases with the amount of pre-definition in a given device. Consequently, a full-custom ASIC faces the least amount of hardware constraint, but a PLD with a limited number of usable fuse-patterns is likely to impose severe limitations on the methods of expression. Electronic interface requirements dictated by the circuitry incorporating the ASIC might also impose additional limitations irrespective of ASIC type.

(b) A comparison with the infringement inquiry in software cases.— Software language and associated practices result in similar limitations. For example, a given software language may only allow certain data structures or command types.[185] ASICs are closely tied to the flexibility of the given device and available programming methods.[186] Also, ASIC and software programmers adhere to industry standards and academic

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178. *Computer Associates*, 982 F.2d at 708; 3 NIMMER & NIMMER § 13.03[F][2].

179. *Apple Computer*, 714 F.2d at 1253.

180. NEC Corp. v. Intel Corp., No. C-84-20799-WPG, 1989 WL 67434, at 16 (N.D. Cal. 1989).

181. *See* LALA, *supra* note 6, at 1-4.

182. 3 NIMMER & NIMMER, *supra* note 94, § 13.03[F][3].

183. *Computer Associates*, 982 F.2d at 709 (citing 3 NIMMER & NIMMER § 13.03[F][3]). *See also*, *Brown Bag Software*, 960 F.2d at 1475; *Whelan*, 797 F.2d 1236.

184. *NEC*, 1989 WL 67434, at 16.

185. *See* 3 NIMMER & NIMMER, *supra* note 94, § 13.03[F][3][b].

186. *See* LALA, *supra* note 6, *passim*.

guidelines which remove some expressive modes from consideration. Thus, public domain exclusion, merger, and *scenes a faire* doctrine carve out bits of expression, sometimes leaving little to protect. The functional utility of ASICs amplifies these constraints, cutting deeper gouges into expression than for traditional software.

With these doctrines in mind, the first software "substantial similarity" test arises from *Whelan Associates v. Jaslow Dental Laboratory*.[187] In *Whelan*, the defendant attempted to author a computer program to assist in administration of a dental lab, but eventually entered an agreement with the plaintiff to create the desired program. Later the defendant tried to write a comparable program in a different language for use on smaller personal computers. Once again, another programmer finished the project. The defendant advertised this program as a new version of the prior program. Despite different programming languages and host computers, the court held that the new program infringed the prior program.[188] The court applied a broad "substantial similarity" standard, holding that expression was any aspect not essential to the single idea of performing administrative tasks for a dental laboratory.[189]

The single idea approach of *Whelan* offers broad infringement protection for software. Although the court discusses the limiting doctrines, it seems to favor policy concerns over detailed application of these doctrines.[190] Under this standard, the same broad protection is likely for ASICs. The single idea underlying an ASIC program is the particular purpose of the personalized device. Hence, under *Whelan*, the literal and non-literal features of a given ASIC are protected for this purpose.

The "total concept and feel test" arose to determine substantial similarity of works created for children,[191] and eventually spread to video game cases.[192] Critics of the test point out vagueness and contradiction of copyright goals.[193] The highly technical character of ASICs emphasizes uncertainties under this standard. A derivative of this test survives in *Brown Bag Software, Inc. v. Symantec Corp.*[194] In that case, a freelance programmer participated in the development of both the plaintiff's and defendant's outlining programs. After examining seventeen similar fea-

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187. 797 F.2d 1222 (3d Cir 1986).

188. *Id.* at 1248.

189. *Id.* at 1238-39.

190. *Id.* at 1235-37.

191. 3 NIMMER & NIMMER, *supra* note 94, § 13.03[A][1][c].

192. *E.g.*, Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 619-20 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982).

193. E.F. Johnson Co. v. Uniden Corp., 623 F. Supp. 1485, 1492-93 (D. Minn. 1985) (finding test unfortunate for computer copyrights); 3 NIMMER & NIMMER § 13.03[A][1][c] (concluding the test contradicts non-protection of ideas).

194. 960 F.2d 1465 (9th Cir. 1992).

tures grouped in five categories, the district court granted a summary judgment for the defendant. The groupings concentrated on computer user interfaces such as outline editing, printing, and display colorization schemes. The summary judgment was affirmed.[195]

The *Brown Bag Software* court applied two tests: an extrinsic objective test and an intrinsic subjective test.[196] The extrinsic test invites expert opinion and applies the expression-limiting copyright doctrines of merger and scenes a fair to "analytically dissect" the scope of protection for the work.[197] The comparison of remaining expression occurs under the intrinsic test. This second prong turns on the subjective response or "overall look and feel" from the perspective of an ordinary and reasonable person.[198] This subjective prong lies in wait to unpredictably deny protection. Exaggeration of this unpredictability is likely for ASICs, given the complex technical concepts involved. Furthermore, recent deemphasis of the intrinsic prong of the test adds new dimensions of uncertainty.[199]

The court in *Computer Associates International, Inc. v. Altai, Inc.*[200] rejected the *Whelan* holding, adopting the "successive filtering method."[201] In *Computer Associates*, an employee went to work for a competitor, Altai, taking copies of source code for an operating system subroutine in violation of employment agreements. At Altai, the employee developed an operating system interface which used about 30% of the stolen code. Upon learning of this infringement, Altai developed a replacement interface program using a procedure similar to clean-room duplication,[202] which excluded the new employee entirely. The trial court found the first program infringed Computer Associates' copyright, but that the

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195. *Id.* at 1478.

196. *Id.* at 1475.

197. *Id.* at 1475-76.

198. *Id.* at 1476. *See also*, Data East U.S.A., Inc. v. EPYX, Inc., 862 F.2d 204, 208 (9th Cir. 1988).

199. Recent decisions of the Ninth Circuit avoided reaching the intrinsic prong of the test for software. *Brown Bag Software*, 960 F.2d at 1476; *Data East*, 862 F.2d at 208.

200. 982 F.2d 693, 705 (2d Cir. 1992). *See* Daniel A. Crowe, *The Scope of Copyright Protection for Non-literal Design Elements of Computer Software: Computer Associates International, Inc. v. Altai, Inc.*, 37 ST. LOUIS U. L.J. 207 (1992) (generally favoring the *Computer Associates* Test). *See also*, Recent Case Note, *Copyright Law—Scope of Protection of Non-literal elements of Computer Programs—Second Circuit Applies an "Abstraction-Filtration-Comparison Test,"* 106 HARV. L. REV. 510 (1992) (criticizing the narrowing of non-literal protection of computer programs by *Computer Associates*).

201. *Computer Associates*, 982 F.2d at 706 (incorporating the three-step test endorsed in 3 NIMMER & NIMMER § 13.03[F]).

202. For discussion of clean-room procedures, *see supra* note 76 and accompanying text.

second program did not. On appeal, despite Computer Associates' challenge, the decision with respect to the second program was affirmed.[203]

The *Computer Associates* test contains three steps. First, the abstraction step decomposes the detailed code of a program into increasingly general patterns, taking out more and more of the expressive "incident" until only ideas are left.[204] The process "resembles reverse engineering on a theoretical plane . . . ."[205] For example, it might start with examination of individual instructions, then organize low-level modules, then examine high-level modules, and finally end at the ultimate purpose of the work. For ROMs, the process is the same as for software, but for other ASICs the outcome depends on the device development process and complexity. Therefore, complex sequential logic devices have many levels, but simpler PLDs have only a few levels.

The second step of the *Computer Associates* substantial similarity test is filtration.[206] This step applies the limiting doctrines of merger, *scenes a faire*, and exclusion of public domain material to filter the unprotected features from the protected expression at each level extracted from the work.[207] This filtration is likely to reveal a significant amount of protected matter for sophisticated devices such as gate arrays, but hardware and software constraints leave little expression for simpler ASICs.

The final step is comparison. This "inquiry focuses on whether the defendant copied any aspect of this protected expression [surviving filtration], as well as an assessment of the copied portion's relative importance with respect to the plaintiff's overall program."[208] This comparison follows the pattern favoring complex ASICs. However, the "comparative importance" consideration provides a glimmer of hope for simple devices which contain minute, but important, expressive aspects.[209] Copying of these important features in an otherwise dissimilar work might yield broader ASIC protection in specific cases. Furthermore, the recognition of even a small amount of protected expression still mandates protection against verbatim copying.

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203. *Computer Associates*, 982 F.2d at 715. The abstraction test originated with Judge Learned Hand in Nichols v. Universal Picture Corp. 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

204. *Computer Associates*, 982 F.2d at 707.

205. *Id.*

206. *Id.*

207. *Id.* at 707-08.

208. *Id.* at 710.

209. *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1515-16 (9th Cir. 1992) (indicating the importance of a 25 byte segment to assure compatibility of programs totaling up to 1.5 million bytes).

The unsettled nature of "substantial similarity" for computer programs is no less prominent when considering ASICs. Although embracing the extension of protection to non-literal software features, judicial and scholarly criticism of the *Whelan* "substantial similarity" test[210] and the uncertainty of the *Brown Bag Software* test support the *Computer Associates* standard.[211] This standard offers a clear, objective, and systematic approach to substantial similarity determinations. Furthermore, the abstraction and filtration steps break down complex technical concepts into manageable fundamental units. Finally, these factors combine to enhance judicial efficiency, fairness, and consistency.

3. Fair Use Defense.—One final area of the Copyright Act germane to ASICs is the defense of fair use.[212] Recently, two cases, *Atari Games Corp. v. Nintendo of America, Inc.*[213] and *Sega Enterprise Ltd. v. Accolade, Inc.*[214] considered whether reverse engineering of a computer program constitutes fair use. Both cases involved competing video game companies that sell plug-in cartridge games. The object code form of these games resides in integrated circuits inside the cartridge. To play the game, one inserts the cartridge in a electronic console connected to a television. In each case, a manufacturer disassembled the object code of a competing manufacturer to produce games compatible with the console of the competing manufacturer. In *Sega*, the manufacturer wired into the circuitry of the competitor's game console to obtain the object code. In *Atari*, the manufacturer disassembled object code by chip peeling the competitor's ROMs.[215] In *Sega*, the United States Court of Appeals for the Ninth Circuit held "where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program . . . disassembly is a fair use of the copyrighted work, as a matter of law."[216] This result confirms the earlier interpretation of Ninth Circuit law by the federal circuit court in *Atari*, where the court held that reverse engineering by chip peeling and disassembly of object code was a fair use for discovery of processes and ideas,[217] including intermediate copying steps.[218]

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210. *See Computer Associates*, 982 F.2d at 705-06; 3 NIMMER & NIMMER § 13.03[F].

211. The *Brown Bag Software* court recently endorsed the *Computer Associates* "substantial similarity" standard which confuses the matter further. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d at 1525. Also, the United States Court of Appeals for the Federal Circuit endorses this test. Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 839-40 (Fed. Cir. 1992).

212. 17 U.S.C. § 107 (1988). *See* 3 NIMMER & NIMMER § 13.05.

213. 975 F.2d at 835 (exercising pendent jurisdiction on copyright issues and consequently applying Ninth Circuit law).

214. 977 F.2d 1510.

215. *See supra* notes 72-74 and accompanying text.

216. *Sega*, 977 F.2d at 1527-28.

217. *Atari*, 975 F.2d at 843-44.

The reverse engineering holding in *Sega* resulted from an analysis of fair use factors provided in the Copyright Act.[219] First, commercial exploitation of information obtained by copying disfavors fair use.[220] Like the video game compatibility in *Sega*, the commercial purposes attendant to reverse engineering of ASICs is likely to raise a presumption against fair use. Even so, reverse engineering of ASICs overcomes this factor by seeking only functional equivalency.[221] Second, the nature of the work supports fair use when copying is needed to access unprotected aspects of the work.[222] Copying to discern functional aspects of video game object code or to discover functional features of an ASIC supports reverse engineering as a fair use. Third, the larger the amount of copying, the more it militates against fair use.[223] The disassembly of the entire program cuts against fair use in *Sega*, as would peeling an entire ASIC chip. However, this factor alone is not fatal to the defense.[224] Finally, the fourth factor concerns the market impact of allowing fair use.[225] It favors ASICs when the effects of reverse engineering are indirect and provide a potential for market growth.

The acceptability of reverse engineering shrinks any available copyright protection for ASICs. The extension of fair use to chip peeling by the *Atari* court reinforces this conclusion.[226] Specifically, the exemption of intermediate copying to discover functionality permits the free transmission of technical ASIC information. Furthermore, because ASICs other than ROMs contain only a remote functional derivative of the source code, reverse engineering encounters a lower expression barrier when compared to more traditional software vehicles. The protection of software, ASICs, or any utilitarian work creates perception problems when compared to the role of copyright law as a guardian of expression.[227] Even if ASICs pass the requisite subject matter tests, only the most prominent expressive features of ASIC source code are likely to survive substantial similarity and reverse engineering challenges. Therefore, practical copyright protection of ASICs extends only to situations involving identical or nearly identical copying of prominent expressive features.

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218. *Id.* However, the court held that Atari infringed Nintendo's copyright because of misuse of access to Nintendo's source code through the federal Registrar of Copyrights Office. *Id.* at 841-42.

219. *Sega*, 977 F.2d at 1521-28.

220. *Id.* at 1522-23.

221. *Id.*

222. *Id.* at 1524-26.

223. *Id.* at 1526.

224. *Id.*

225. *Id.* at 1522.

226. *Atari*, 975 F.2d at 836.

227. *Id.* at 843.

C. Semiconductor Chip Protection Act (SCPA)

ASIC protection is not exhausted by the Copyright Act. In 1984, Congress enacted the Semiconductor Chip Protection Act (SCPA) aimed at the protection of integrated circuits.[228] The SCPA picks up where the Copyright Act left off by providing protection for mask works images.[229] The rights of the mask works registrant include the right to exclusively reproduce, distribute, and import the mask work and semiconductor products embodying it.[230] The SCPA protection lasts for ten years.[231] Similar to copyrights, SCPA issues include whether ASICs are proper subjects for protection. Although SCPA mask work infringement involves substantial similarity,[232] it does not suffer from a split of authority. However, potential conflicts between the SCPA and the Copyright Act pose issues other than subject matter. For example, one question is whether ASIC protection under the SCPA precludes copyright protection. Also at issue is how the relationship of the reverse engineering defense of each act might impact ASIC protection.

Uncertainty also stems from a dearth of litigation under the SCPA. The dominant explanation is that modern chip complexity and incompatible manufacturing processes render chip mask piracy uneconomical in comparison to the piracy of simpler devices which initially spawned the SCPA.[233] However, these factors are driven by unpredictable market and technology factors.[234] Also, more than 9,000 mask work registrations suggest continued interest in SCPA protection.[235] In fact, the relative ease of duplicating a few personalization layers, fuse-link pattern, or

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228. Semiconductor Chip Protection Act of 1984, Pub. L. 98-620, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901-914 (1988)).

229. 17 U.S.C. §§ 902 (1988).

230. *Id.* § 905.

231. *Id.* § 904(b).

232. *See* Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555, 1564-65 (Fed. Cir. 1992).

233. *See*, John G. Rauch, *The Realities of Our Times: The Semiconductor Chip Protection Act of 1984 and the Evolution of the Semiconductor Industry*, 75 J. PAT. & TRADEMARK OFF. SOC'Y 93, 114-16 (1993); Robert J. Risberg, Jr., *Five Years Without Infringement Litigation Under the Semiconductor Chip Protection Act: Unmasking the Spectre of Chip Piracy in an Era of Diverse and Incompatible Process Technologies*, 1990 WIS. L. REV. 241, 244-45.

234. Gerard V. Curtin, Jr., Comment, *The Basics of ASICs: Protection for Semiconductor Mask Works in Japan and the United States*, 15 B.C. INT'L & COMP. L. REV. 113, 120 (1992).

235. At least 9020 mask work registrations exist; Search of WESTLAW, COPYRIGHT Library, (July 20, 1993) (search for records with mask works class designator, "CL(MW)"). *See also, supra* note 12 and accompanying text (describing alterative protection methods sought by integrated circuit manufacturers).

the program corresponding to erasable ASIC connections might breathe new life into the act.

1. SCPA Subject Matter.—The subject matter protected under the SCPA is "a mask work fixed in a semiconductor chip product."[236] "However, protection shall not be available for unoriginal mask works or mask work designs which are "staple, commonplace, or familiar in the semiconductor industry . . . ."[237] Similar to the Copyright Act, the SCPA expressly withholds protection from an "idea, procedure, process, system, method of operation, concept, principle or discovery."[238] Consequently, the following tests exit for SCPA subject matter: (1) whether a mask work exists, (2) whether the mask work is fixed in a semiconductor product, (3) whether the mask work is original and not staple or commonplace, and (4) whether the mask work is excluded as an idea, process, or method of operation.

(a) Does a mask work exist?—The SCPA definition of mask work is "a series of related images . . . having a three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor product . . . ."[239] The statute requires each image to correlate to "the pattern of the surface of one form of the semiconductor chip product . . . ."[240] This designation includes any ASICs with mask layers. In fact, the Register of Copyrights states "semiconductor chip products that are produced by adding metal-connection layers to unpersonalized gate arrays may separately register the entire unpersonalized gate array and the custom metallization layers."[241] An "unpersonalized gate array" is defined as "an intermediate form chip product that includes a plurality of circuit elements that are adaptable to be personalized into a plurality of different final form chip products in which some of the circuit elements are or will be, connected as gates."[242] Although administrative regulations are not conclusive, they are often given deference.[243] At least one commentator suggests the SCPA is an exclusive means of protecting some ASICs.[244]

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236. 17 U.S.C. § 902(a) (1988).
237. *Id.* § 902(b).
238. *Id.* § 902(c).
239. *Id.* § 901(a)(2).
240. *Id.* § 901(a)(2)(B).
241. 37 C.F.R. § 211.4(c) (1991) (codification of 56 Fed. Reg. 7,816 (1991)).
242. *Id.*
243. *See, e.g.*, Marascalco v. Fantasy, Inc., 953 F.2d 469, 473 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) (giving judicial deference to Register of copyright interpretation); Eltra Corp. v. Ringer, 579 F.2d 294, 297 (4th Cir. 1978) (recognizing Register of copyrights can issue rules and regulations as an executive officer).
244. Gerard V. Curtin, Jr., Comment, *The Basics of ASICs: Protection for Semiconductor Mask Works in Japan and the United States*, 15 B.C. Int'l & Comp. L. Rev. 113, 115 (1992).

Thus, ASIC personalization masks for full-custom and semicustom gate arrays satisfy this requirement. In contrast, fuse-based ASICs are not as easily protected because a custom mask is not the usual result. However, just as dedicated equipment converts the source code into an ASIC fuse pattern, it may also produce a mask work corresponding to the fuse pattern. Although not necessary to the manufacturing process, this artificial fuse-link mask work still appears to comply with the SCPA definition. Because SCPA protection apparently extends to software representations of mask layers, a fairly complete protection of fuse-link ASICs seems possible.[245] In contrast, the absence of a related image for the personalization layers of erasable ASICs reveals that SCPA protection for these devices is less likely.[246]

(b) Is the mask work fixed?—The questionable status of erasable devices also breeds uncertainty under the fixation element. Specifically, "a mask work is 'fixed' in a semiconductor chip product when its embodiment in the product is sufficiently permanent or stable to permit the mask work to be perceived or reproduced from the product for a period of more than transitory duration."[247] Furthermore, legislative history reveals that although a computer program representation of a mask work is protected,[248] such a representation does not satisfy the fixation requirement.[249] Reading the programmed pattern from an erasable device is possible using both personalization equipment and less direct techniques. However, the information perceived is not likely to be a "mask work" as defined by the statute. Consequently, the "mask work" definition is likely limited to a visually related image and probably excludes erasable ASICs from protection under the SCPA. In contrast, mask-based and fuse-link ASICs appear to comply with the fixation requirement.

(c) Is the mask work original?—The SCPA originality requirement incorporates the same meaning used in the Copyright Act.[250] However, the "staple or commonplace" requirement is not as clear.[251] These terms arguably add to the copyright originality requirement. One view holds that this requirement lies between copyright originality and the more rigorous novelty requirement for patents.[252] Another argument suggests

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245. H.R. Rep., No. 781, 98th Cong., 2d Sess. 17 (1984), *reprinted in,* 1984 U.S.C.C.A.N. 5750, 5766.

246. For an explanation of erasable ASICs, *see supra* notes 67-71 and accompanying text.

247. 17 U.S.C. § 910(a)(3) (1988).

248. H.R. Rep., No. 781, at 20 (1984).

249. *Id.* at 17 (1984).

250. *Id.*

251. 3 Nimmer & Nimmer, *supra* note 94, § 18.03[B].

252. 35 U.S.C. § 102 (1988).

the addition of a type of nonobviousness reminiscent of patent law.[253] Nonetheless, the legislative history indicates these additional statements only codify "some minimum of creativity" and prohibit protection for works in the public domain.[254] Also, the legislative history contrasts this element with patent law elements, implying that the more stringent patent requirements do not apply.[255] A higher standard jeopardizes categorical protection of not only ASICs, but also other integrated circuits. This result contradicts the intent of the SCPA.[256]

(d) Is the mask work excluded as an idea, process, or method of operation?—The final element is that SCPA protection not extend to "idea, process, system, method of operation, concept, principle, or discovery . . . ."[257] This does not appear to present a problem for mask-based ASICs. The legislative history refutes the "useful article" doctrine encountered under the Copyright Act.[258] Also, legislative history of the SCPA suggests the provision is only meant to distinguish protection reserved for patent law.[259]

On the other hand, simpler fuse-link ASICs such as PLAs and PALs might encounter a problem in connection with this element. The personalization of these devices depends on programming one of a finite number of fuse patterns for a given device. If the SCPA protects the first registrant for a given pattern, but refuses to protect identical patterns independently developed later, then the registration effectively removes the pattern as an option for other developers. Consequently, the idea underlying the pattern would obtain protection in opposition to the subject matter element,[260] and exclusion of simpler finite pattern devices from SCPA protection follows.[261] However, if the SCPA adopts the copyright rule that independent authors of identical works deserve equal protection,[262] the problem is avoided. Still, the absence of express statutory guidance is troubling. In contrast, the legislative history discusses reproduction of semiconductor chip products along the lines of copying under the Copyright Act.[263] Also, in the only SCPA case reaching the

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253. *Id.* § 103.

254. H.R. Rep., No. 781, 98th Cong., 2d Sess. 19 (1984), *reprinted in,* 1984 U.S.C.C.A.N. 5750, 5768.

255. *Id.*

256. *Id.* at 3.

257. 17 U.S.C. § 902(c) (1988).

258. H.R. Rep., No. 781, at 10, 16.

259. *Id.* at 19.

260. *See id.* at 8-9.

261. *Id.* at 9.

262. For discussion of this rule in the context of copyright infringement, *see supra* note 168 and accompanying text.

263. H.R. Rep., No. 781, at 20.

appellate level, the district court concluded that the independent development rule of copyright applies.[264] In summary, full-custom and semicustom mask-based ASICs seem to stand on firm ground with the SCPA, but fuse-based devices are less reliably protected. Protection of erasable ASICs is the most questionable.

2. Copyright and the SCPA.—The first issue under this comparison is whether the SCPA excludes any aspect of copyright protection for ASICs. The SCPA states that it does not alter rights obtained by copyright or patent.[265] As a result, the SCPA does not affect copyrights in computer programs.[266] However, even if a mask work copyright becomes possible, then the SCPA probably supersedes the copyright.[267] Surely ASIC software, in isolation from an integrated circuit specification role, deserves copyright protection as much as any other computer program. However, the copyright protection of an ASIC as a software-bearing device is less clear given its close association with chip masks. If exclusive protection did arise, then incongruent results follow for mask-based ROMs,[268] currently protected as a software vehicle under the Copyright Act.[269] To avoid this conflict with well-established law, the best result is to strictly limit any exclusion to redundant mask work protection.

In addition to the issue of concurrent protection, the role of reverse engineering in the SCPA and in copyright law generates controversy. The only SCPA case reaching the United States Court of Appeals, *Brooktree Corp. v. Advanced Micro Devices, Inc.*,[270] focused on the reverse engineering defense. In this case, Brooktree obtained two mask work registrations for a color video display integrated circuit which replaced thirty-six discrete integrated circuits. The mask works litigation focused on a ten transistor memory cell configuration which was repeated over 6,000 times, consuming 80% of the chip area. At trial, Advanced Micro Devices ("AMD") raised the reverse engineering defense, claiming that $3 million and two and one half years was spent to develop the chip. In reply, Brooktree asserted the costs resulted from AMD efforts to reproduce the cell using eight instead of ten transistors because of a mistaken count during an initial inspection of the Brooktree chip.

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264. Brooktree Corp. v. Advanced Micro Devices, Inc., 705 F. Supp. 491, 494 (S.D. Cal. 1988).

265. 17 U.S.C. § 912(a).

266. *See* 3 NIMMER & NIMMER, *supra* note 94, § 18.11[A].

267. *See* 3 NIMMER & NIMMER, *supra* note 94, § 18.11[B], n.16.

268. For a discussion of a mask as a substitute for fuse-links, *see supra* note 66 and accompanying text.

269. *E.g.*, Apple Computer, Inc., v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983), *cert. denied*, 464 U.S. 1033 (1984).

270. 977 F.2d 1555, 1569-70 (fed. cir. 1992). SCPA claims were pendant to patent claims. Federal circuit jurisdiction over patent claims is exclusive. *Id.* at 1561.

Also, Brooktree buttressed the argument by pointing out AMD's completion of the design within one week after realizing the mistake. Furthermore, the AMD design used similar transistor groupings. However, AMD's and Brooktree's designs differed because the AMD transistors lacked forty-five degree angles, used smaller transistors, and diverse interconnection patterns. Yet Brooktree claimed these differences were essentially irrelevant to the function of the chip. The jury awarded $25 million to Brooktree on SCPA and related patent infringement claims. The award withstood appeal.[271]

The SCPA expressly authorizes a reverse-engineering defense.[272] This defense requires "a person who performs the analysis or evaluation . . . to incorporate the results of such conduct in an original mask work which is made to be distributed."[273] The primary means of establishing the defense is by showing a significant paper trail documenting the reverse engineering.[274] If a paper trail is established the substantial similarity standard collapses into whether the "resulting semiconductor chip product is not substantially identical to the protected mask work and its design involved significant toil and investment so that it is not mere plagiarism, it does not infringe the original chip, even if the layout of the two chips is, in substantial part, similar."[275] The *Brooktree* jury found the reverse engineering defense did not survive this test, despite distinct differences and arguable improvements in the product developed by AMD.[276]

The existence of an express SCPA reverse engineering defense arguably implies the absence of such a defense under fair use provisions of the Copyright Act.[277] In contrast, the extensive reverse engineering in *Atari* and *Sega* avoided infringement to support pursuit of compatibility with existing products. Moreover, the *Sega* court insists the SCPA reverse engineering defense "says nothing about its intent with respect to the lawfulness of disassembly of computer programs under the Copyright Act."[278] Although different product types and different types of works distinguish the reverse engineering defenses of the two acts, the standards collide when a device is covered by both acts, such as a mask-based

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271. *Id.* at 1583.

272. 17 U.S.C. § 906(a) (1988).

273. 17 U.S.C. § 906(a)(2).

274. *Brooktree*, 977 F.2d at 1565-66 (citing several sources of legislative intent).

275. *Id.*

276. The AMD chip dropped the forty-five degree angle configuration and used a smaller 1.5 micron transistor technology in lieu of the slower 2.0 micron Brooktree technology. *Brooktree*, 977 F.2d at 1568-70. *See* John G. Rauch, *supra* note 233, at 122 for criticism of the *Brooktree* result.

277. 3 NIMMER & NIMMER, *supra* note 94, § 13.03[F], n.271.

278. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d at 1522.

ROM. Despite the unlikelihood of this confrontation, the possibility suggests a marriage of the standards at least in the case of ASICs.

III. Engineering Better Protection

The intellectual property statutes create a continuum of protection. At one extreme, copyright law shelters expression.[279] At the other extreme, patent law covers technological innovation.[280] In between, the SCPA provides a refuge for mask works displaying characteristics of both extremes.[281] The courts emphasize this continuum when considering expansion of intellectual property protection.[282] In addition, the CONTU report condones a limited judicial power to handle new technology needs.[283] Furthermore, legislative history for the SCPA recognizes areas requiring judicial solutions.[284] The rapid pace of technology requires a flexible form of protection that can keep pace. Hence, a judicial license to adapt existing protection to new technology is suggested—particularly for ASICs.

A. Holistic ASIC Protection

The exercise of a judicial license already resulted in solid copyright protection for ROMs as a software vessel. Although not yet judicially endorsed, SCPA protection for full-custom and semicustom ASICs seems certain. However, copyright coverage of ASICs is suspect, particularly for simpler devices. Also, simpler devices encounter problems with SCPA protection. The protection of erasable ASICs under the SCPA is unlikely because of the absence of a fixed mask work. Although neither act is capable of bringing complete protection, some minor adjustments could provide complete protection through both acts.

Several factors support better ASIC protection. One factor is the intellectual property policy to promote progress rather than reward authors.[285] Although categorical protection rewards ASIC investments, it also motivates technological improvements. One commentator finds the balance favors categorical ASIC protection.[286] The computer program

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279. Computer Assocs. Int'l, Inc. v. Altai, Inc, 982 F.2d at 703.

280. H.R. Rep., No. 781, 98th Cong., 2d Sess. 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5752. *See also, Brooktree*, 977 F.2d at 1562-63.

281. *Brooktree*, 977 F.2d at 1562-63.

282. *See* Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d at 842-43.

283. CONTU Report, *supra* note 120, at 22-23.

284. H.R. Rep., No. 781, at 26-27.

285. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 21, 219 (1954); *Atari*, 975 F.2d at 842-43.

286. *See*, Glynn S. Lunney, Jr., Note, *Copyright Protection for ASIC Gate Configurations: PLDs, Custom and Semicustom Chips*, 42 Stan. L. Rev. 163 (1989).

amendment to the Copyright Act and the creation of mask work protection under the SCPA indicate legislative preference to extend categorical protection for similar new technologies. As a software-hardware hybrid, the same intent applies to ASICs. A contrary result discourages the application of more innovative products such as erasable ASICs. Also, to let the current partial protection prevail is to base legal rules on subtle technological distinctions. This threatens to destabilize legal protection without a guiding rationale. Comprehensive ASIC protection avoids the inconsistencies inherent in partial protection. Moreover, creation of a comprehensive scheme resolves several uncertainties plaguing the SCPA and Copyright Act.

First, despite the "staple or commonplace" language in the SCPA, unification with the copyright originality standard resolves doubts in favor of ASICs. It also supports a broader protection consistent with legislative intent and incorporates the mature copyright originality standard into the SCPA, increasing consistency.

Second, courts should avoid engrafting the one-to-one correlation requirement from the CONTU Report onto the fixation requirement of either act. This approach clarifies ASIC protection and avoids the inconsistency of protecting object code without correlation to the source code. Similarly, the interpretation of mask works to include fuse-pattern devices is consistent with the SCPA. However, software cannot substitute for a properly fixed mask work in the device.[287] Unfortunately, the definition of mask work to include erasable ASICs requires legislative action in order to preserve certainty.

Third, the three-step substantial similarity test from *Computer Associates* provides a meaningful standard with which to tailor protection for ASICs under the Copyright Act. The enhanced expression in complex ASICs warrants broader protection than that for simpler devices. Moreover, the standard recognizes the importance of small, but critical segments which are important for devices used in sophisticated systems.[288] A similar approach should frame the infant SCPA infringement standard under the same rationale. Also, the *Computer Associates* standard dovetails with legislative intent to treat SCPA substantial similarity in terms of compilation and derivative works.[289] The current migration of the circuits toward this standard assists the application to ASICs.[290] Finally, importation of the copyright standard that forbids protection of inde-

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287. H.R. Rep., No. 781, at 17.

288. For example, copying of 25 bytes out of video game code comprising at least 500,000 bytes is the deciding compatibility factor. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d at 1516.

289. H.R. Rep., No. 781, at 26.

290. *See supra* note 211.

pendently created identical works assures simpler ASICs will not become undeserving of SCPA protection as an idea or method of operation.

Construing the acts together with the purpose of protecting ASICs avoids potential conflicts. As a consequence, mask work images should remain the exclusive domain of the SCPA, with parallel copyright protection for ASIC software expression. Furthermore, avoiding future reverse engineering conflicts suggests that the copyright standard include the explicit improvement showing for ASICs. Copyright fair use factors provide an avenue to account for the additional standard in proportion to the hybrid nature of the work. The *Sega* and *Atari* decisions have begun to clear a path toward this result.

B. Conclusion

The hybrid nature of ASICs calls for integrated interpretation of the Copyright Act and SCPA. Although the resulting dual protection might muddle the already complex distinctions between the two acts, it is the best compromise in light of legislative, judicial, and social policies. Moreover, the process reconciles several issues confronting the protection methods. Finally, this approach provides a systematic method to carry forward copyright and SCPA protection principles for future technological advancements.

Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders

Lowell T. Woods, Jr.*

As always, the curtains on the windows of Ann Kotel's apartment in Greenlawn, New York, were drawn tightly on the night of June 2, 1990, and cardboard covered the spaces the curtains missed. A pair of scissors lay carefully positioned on the kitchen table. A chair leaned against the front door.

Kotel, a 52 year-old Long Island schoolteacher, rarely left the apartment, except to go to and from work. Wherever she went, even within her own home, she carried a ball-peen hammer in a small blue tote bag. She told one friend that she slept with the hammer under her pillow. That night Kotel told a friend who had come to visit the same thing she had repeatedly told her family and the police: Her ex-boyfriend, Kenneth Maher, was going to find her and kill her. In fact, as Kotel and her friend spoke, Maher, then 43, was smoking a cigarette behind a tree in the yard. He wore black pants and a black shirt, scuba diving gloves, and a camouflage bandanna wrapped around his head. He had a sawed-off shotgun in his hand, a dagger in his belt, and 20 rounds of ammunition in his pockets.

Shortly after her friend left, Ann Kotel became one of the more than 1,320 women murdered in 1990 by husbands or boyfriends; one of the 1,980 Americans killed that year with a rifle or shotgun; and one of the unquantifiable number of women whose court orders of protection failed to protect them from future violence. The only thing that made Kotel different, perhaps, was how diligently she sought to protect herself — and how presciently she realized that the law enforcement system, though fully aware of her predicament, would not prevent her murder.[1]

Introduction

As a result of several high-profile cases in which attackers terrorized and then killed their victims, there has been an outburst of legislative

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1. Andy Court, *She Knew The System Would Fail Her*, Am. Law., June 1992, at 110.

activity criminalizing behavior defined as stalking.[2] Since California passed the first anti-stalking bill in 1990[3] as many as forty states have proposed legislation designed to protect celebrities and battered women and children who are subject to repeated harassment At present, twenty-nine states have made stalking a crime.[4] Stalking legislation also has been the focus of several bills recently considered by the United States Congress.[5]

There are two principal types of stalking. One type is considered domestic violence, which typically involves spurned spouses and lovers. The other type is known as erotomania, or "phantom-lover syndrome," in which the victim does not know or has only a passing acquaintance with the stalker.[6] Although many of the well-publicized cases which helped generate awareness of stalking involved erotomania, the majority of stalking incidences are an outgrowth of domestic violence.[7] Not surprisingly, advocates of anti-stalking legislation often cite statistical information concerning domestic violence committed by adult males.[8] Nonetheless, females and minors also exhibit stalking behavior.[9]

Stalking victims have, in the past, sought relief through the use of protective orders.[10] A majority of states have enacted protective or restraining order legislation,[11] primarily as a remedy for women subject

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2. Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35.

3. CAL. PENAL CODE § 646.9 (West Supp. 1992). *See also* Gary Spencer, *State Tightens Penalties for Stalking*, N.Y. L.J., Aug. 20, 1992, at 1.

4. Chris Andrews, *Michigan Senate Approves Anti-Stalker Legislation*, GANNETT NEWS SERVICE, Dec. 4, 1992. *See* list of statutes accompanying note 91 *infra*.

5. S. 2922, 102d Cong., 2d Sess. (1992); S. 3271, 102d Cong., 2d Sess. (1992); H.R. 5876, 102d Cong., 2d Sess. (1992); H.R. 5960, 102 Cong., 2d Sess. (1992).

6. John Ward Anderson, *Virginia Targets Stalkers; Bills Would Outlaw Repeated, Fear-Inducing Harassment*, WASH. POST, Feb. 10, 1992, at D1.

7. 138 CONG. REC. S15,966 (daily ed. Oct. 1, 1992) (statement of Sen. Rockefeller).

8. According to the FBI's Uniform Crime Reports, in 1990 approximately thirty percent of female murder victims had been slain by their husbands or boyfriends. *Co-operative Agreement to Develop Model State Anti-Stalking Law*, U.S. NEWSWIRE, Dec. 23, 1992 [hereinafter *Cooperative Agreement*].

9. *See, e.g., First Woman Arrested Under Illinois' Anti-Stalking Law*, UNITED PRESS INT'L, Dec. 17, 1992; *see also Boy, 12, Accused as Stalker*, N.Y. TIMES, Dec. 17, 1992, at B21.

10. 138 CONG. REC., *supra* note 7, at S15,966.

11. State statutes that authorize protective orders include: ALA. CODE §§ 30-5-1 to -11 (1989); ALASKA STAT. §§ 25.35.010-.060 (1991); ARIZ. REV. STAT. ANN. §§ 13-3601 to -3602 (Supp. 1991); CAL. CIV. PROC. CODE §§ 540-553, 527.6 (1991); COLO. REV. STAT. §§ 14-4-101 to -105 (1989); CONN. GEN. STAT. ANN. §§ 46b-1 to -11, 46b-15 (West 1986 & Supp. 1991); DEL. CODE. ANN. tit. 10, §§ 921, 950 (1975 & Supp. 1991); D.C. CODE ANN. §§ 16-1001 to -1006 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1992); GA. CODE ANN. §§ 19-13-1 to -22 (1991); HAW. REV. STAT. §§ 586-1 to -11 (1985); IDAHO CODE §§ 39-6301 to -6317 (Supp. 1991); ILL. ANN. STAT. ch. 40, para. 2311-1 to -3

to domestic violence.[12] Courts can direct an assailant to refrain from further abusive conduct through the use of a temporary or permanent protective order.[13] However, the use of protective orders to prevent stalking behavior poses a number of problems. Apart from the uncertain effectiveness of protective orders, in many instances the reach of legislation providing this remedy is limited to certain types of abuse, certain persons, and certain forms of relief.[14]

Part I of this Note will explore the adequacy of protective order legislation in the context of preventing stalking-type behavior. After providing a brief overview of protective order enactments, the Note examines the advantages and problems inherent in this type of legislation. Part II of this Note will evaluate current anti-stalking legislation and its potential to meet the perceived inadequacies of protective orders. In addition, this Note considers criticisms of anti-stalking laws, and presents additional measures which might further the goals of anti-stalking legislation.

(Smith-Hurd Supp. 1991); IND. CODE ANN. §§ 34-4-5.1-1 to -7 (Burns 1986 & Supp. 1991); IOWA CODE ANN. §§ 236.1-.18 (West 1985 & Supp. 1991); KAN. STAT. ANN. §§ 60-3101 to -3111 (Vernon 1990); KY. REV. STAT. ANN. §§ 403.715-.785 (Michie/Bobbs-Merrill 1984 & Supp. 1991); LA. REV. STAT. ANN. §§ 46:2131-:2142 (West 1982 & Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 761-770 (West 1981 & Supp. 1987); MD. FAM. LAW CODE ANN. §§ 4-501 to -510 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 209A, §§ 1-9 (West Supp. 1991); MICH. COMP. LAWS ANN. § 600.2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1991); MISS. CODE ANN. §§ 93-21-1 to -29 (Supp. 1991); MO. ANN. STAT. §§ 455.010-.230 (Vernon Supp. 1991); MONT. CODE ANN. §§ 40-4-121 to -125 (1991); NEB. REV. STAT. §§ 42-901 to -927 (1988); NEV. REV. STAT. § 33.017-.100 (1991); N.H. REV. STAT. ANN. §§ 173B:1-11a (Supp. 1991); N.J. STAT. ANN. §§ 2C:25-1 to :25:16 (West 1982 & Supp. 1991); N.M. STAT. ANN. § 40-13-1 (Michie 1989); N.Y. FAM. CT. ACT § 812 (McKinney 1983 & Supp. 1991); N.C. GEN. STAT. §§ 50B-1 to -8 (1989); N.D. CENT. CODE §§ 14-07.1-01 to -08 (1991); OHIO REV. CODE ANN. §§ 3113.31-32 (Anderson 1989); OKLA. STAT. ANN. tit. 22, §§ 60-60.7 (West Supp. 1991); OR. REV. STAT. §§ 107.700-.730 (1990); PA. STAT. ANN. tit. 23, §§ 6101-6117 (1991); R.I. GEN. LAWS §§ 8-8-1 to -3, 15-15-3 to -6 (Supp. 1991); S.C. CODE ANN. §§ 20-4-10 to -130 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 25-20-1 to -13 (1984 & Supp. 1991); TENN. CODE ANN. §§ 36-3-601 to -614 (1991); TEX. FAM. CODE ANN. §§ 71.01-.19 (West 1986); UTAH CODE ANN. §§ 30-6-1 to -10, 77-3-1 to -12 (1989); VT. STAT. ANN. tit. 15, §§ 1101-1109 (1989); VA. CODE ANN. §§ 16.1-253.1, 16.1-279.1 (Michie 1988); WASH. REV. CODE ANN. §§ 26.50.010-.090 (West 1986); W. VA. CODE §§ 48-2A-1 to -10 (1986); WIS. STAT. ANN. § 813.12 (West Supp. 1991); WYO. STAT. §§ 35-21-101 to -107 (1988). *See also* Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies For Domestic Violence But Mutual Protective Orders Are Not,* 67 Ind. L.J. 1039, 1040 (1992).

12. Janice L. Grau, *Restraining Order Legislation For Battered Women: A Reassessment*, 16 U.S. L. REV. 703, 703 (1982).

13. *Id.*

14. *Id.* at 704.

I. Civil Protection Orders as a Remedy for Stalking Behavior

Barring the existence of anti-stalking legislation, a victim of repeated harassment or violence has limited options to prevent future instances of abuse. The victim may rely upon the police to respond to specific instances of threatening behavior by an assailant. If actual violence is involved, the victim can seek criminal charges for assault and battery. When prosecuted effectively, this remedy will incarcerate the abuser, preventing future instances of abuse.[15] However, in many instances the abuser may not have committed an act that the law recognizes as criminal, and police response may occur only after the crime has escalated into a serious assault or homicide.[16]

As an alternative form of relief, an increasing number of victims of repeated abuse are seeking protection orders.[17] If the restraining order fails to prevent further abuse, violation of the court-issued order may result in criminal and civil sanctions.[18] However, even assuming that protective orders are a viable remedy for victims of repeated abuse, problems relating to access, procedures, and sanctions may make this remedy less effective than others.[19]

A. Civil Protection Orders: How They Operate

To obtain a protection order, a victim of repeated harassment must be statutorily eligible. The legislative definition of "abuse" and the statutorily-mandated relationship between the victim and defendant are examples of barriers to court access.[20]

Jurisdictions vary in their definition of conduct that qualifies as abuse.[21] Some require physical violence, while others require only threatened abuse.[22] Fewer states permit protection orders in response to attempted physical abuse.[23] Some states expand the definition of abuse to incorporate forced sexual relations, violations of criminal statutes, or

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15. Topliffe, *supra* note 11, at 1041.

16. *Cooperative Agreement, supra* note 8.

17. *See, e.g.*, Adrian Walker, *Restraining Orders Are At Record High,* Boston Globe, Sept. 23, 1992, at Metro/Region 1 (indicating that Massachusetts courts issued a record 45,000 restraining orders, reflecting an increase in domestic violence and a heightened awareness of the legal tools victims can use to protect themselves).

18. Grau, *supra* note 12, at 704.

19. *Id.* at 705.

20. *Id.* at 706.

21. Topliffe, *supra* note 11, at 1043 (citing P. Finn & S. Colson, U.S. Dep't of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement 12-13 (1990)).

22. *Id.*

23. *Id.*

deliberate damage to personal property.[24] However, most definitions omit psychological abuse.[25]

A victim's relationship with the defendant may further limit the availability of protective orders:

> Depending upon the jurisdiction, restraining order legislation may apply to spouses, former spouses or unmarried persons. Some jurisdictions limit access to spouses only, but others permit access to spouses and former spouses. Most states also permit unmarried persons to bring actions. However, restrictions are made regarding the eligibility of unmarried persons. The state may require the parties to be adults, members of the opposite sex, or involved in a close relationship. The parties may also have to live together . . . .[26]

In states where the relationship requirement is restrictive, the use of protective orders as a method to prevent domestic violence is severely limited.

Where civil protection orders are statutorily available to a victim, states can use them in conjunction with, or as an alternative to criminal charges.[27] Protective order legislation generally requires the filing of a petition to initiate proceedings, and frequently the petition must allege abuse.[28] Often, the petitioner must pay a filing fee. Some localities waive the fee completely, or will do so upon a showing of indigency, but most jurisdictions simply do not address this issue.[29] The petition and filing fee are characteristic of a victim-initiated civil proceeding, as opposed to a state-initiated criminal proceeding.[30]

Filing a petition to obtain a court-issued restraining order is but the first step in obtaining protection. Subsequently, one must go through a lengthy legal process which ensures a delay in relief. Frequently, however, a victim needs immediate protection from an assailant.[31] To avoid harassment and intimidation of the victim prior to issuance of a permanent order, most states authorize temporary restraining orders which may be obtained upon an ex parte showing that the victim is in danger of being harmed.[32] This order gives the victim security while she

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24. Grau, *supra* note 12, at 706.
25. *Id.*
26. *Id.* at 706-07.
27. Topliffe, *supra* note 11, at 1042.
28. Grau, *supra* note 12, at 709.
29. *Id.* at 710.
30. *Id.*
31. *Id.*
32. Topliffe, *supra* note 11, at 1042. *See also* Grau, *supra* note 12, at 1042-43.

seeks a more permanent judicial remedy.[33] The duration of a temporary order is limited to a specified number of days, and a hearing may be required within a certain time frame.[34] In some situations, a victim may require immediate protection at a time when the court is not is session.[35] A limited number of states allow issuance of emergency orders.[36] Subject to the statutory provisions of the particular legislation, one may obtain these orders on weekends or when the court is not in session.[37]

When obtaining a permanent protective order, a majority of states require that the victim show the allegations of abuse are supported by a preponderance of the evidence at a hearing on the petition.[38] A good cause finding that the defendant has committed or will commit the alleged abuse is the only requirement in some jurisdictions.[39]

A permanent order can provide a variety of remedies.[40] The order may direct the assailant to stop harassing the victim at work or at home.[41] Because protective order legislation is targeted at domestic situations, in many jurisdictions the permanent order also may include no-contact, child custody and visitation provisions, and mandatory counseling for the abuser.[42]

Although called "permanent," a court will grant a protective order only for a limited duration.[43] Usually, the duration of a permanent order does not exceed one year, although certain jurisdictions will allow extensions.[44] Some statutes require that the defendant and appropriate law enforcement agencies be given notice of the order.[45] Once an individual has obtained a restraining order and the defendant has received a copy, the order's effectiveness in preventing repeated instances of abuse may depend upon police response to violations and the statutorily-imposed sanctions.[46]

Some jurisdictions have statutorily-mandated law enforcement procedures that impose some punishment for violation of a protective order.[47]

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33. Topliffe, *supra* note 11, at 1042.
34. Grau, *supra* note 12, at 712.
35. *Id.*
36. *Id.*
37. *Id.*
38. Grau, *supra* note 12, at 712-13.
39. *Id.* at 713.
40. Topliffe, *supra* note 11, at 1043.
41. *Id.*
42. *Id.*
43. Grau, *supra* note 12, at 713.
44. *Id.* at 717.
45. *Id.* at 718.
46. *Id.* at 719.
47. *Id.* at 720.

Protection order legislation itself may decree sanctions for a direct violation of an order, such as subsequent attacks on the victim when the order directs the abuser to refrain from such conduct.[48] Violations may result in civil contempt, indirect criminal contempt, arrest, or misdemeanor charges.[49]

Restraining order violations are punishable as civil contempt in most jurisdictions.[50] In order to obtain civil contempt sanctions after an assailant violates an existing order, the victim must file civil contempt charges and often must repeat the process necessary to obtain the protective order initially.[51] The court may secure the defendant's presence by a warrant for arrest, notice of hearing or an order to show cause.[52] If found guilty of civil contempt, the penalty may be imprisonment, a fine or both.[53]

Immediate arrest may be the penalty for violation of a restraining order. Arrest may be the exclusive sanction, or it may be one of several available options.[54] Some states have placed a greater priority on arresting violators of restraining orders when those violators have committed additional offenses.[55] Some jurisdictions may require verification of the existence of the restraining order before police can affect an arrest.[56] States vary on the issue of whether a warrant is required to affect an arrest based upon probable cause where an assailant violates a restraining order.[57]

States may classify the violation of a restraining order as a misdemeanor.[58] Typically, sanctions are imprisonment, a fine or both.[59] As this classification makes any violation a criminal offense, procedures generally governing arrest will apply.[60] This will permit arrest without a warrant if based upon probable cause, and therefore, abuse will not need to have transpired in the presence of an investigating police officer.[61] Other statutes specify arrest procedures for violation of restraining orders.[62]

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48. *Id.*
49. *Id.*
50. *Id.*
51. Topliffe, *supra* note 11, at 1045.
52. Grau, *supra* note 12, at 721.
53. *Id.*
54. *Id.*
55. Walker, *supra* note 17, at Metro/Region 1.
56. Grau, *supra* note 12, at 721.
57. *Id.*
58. *Id.* at 722.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

The rise in the use of protective orders by victims of domestic violence evidences an extensive belief in their effectiveness. As the majority of abuse involving stalking behavior originates from domestic violence,[63] protective orders are an option for many victims. When available, protective orders can have many advantages as a means to terminate continuing abuse by an assailant.

B. The Advantages of Civil Protection Orders in Preventing Stalking Conduct

A victim of repeated violence who is eligible for a protective order may prefer this form of protection over criminal sanctions for several reasons. Protection order legislation often provides for temporary relief, which states may make immediately available.[64] In addition, courts may tailor the form of relief in a permanent order to meet the needs of the particular situation.[65] Moreover, because of the reduced standard of proof and absence of criminal procedural safeguards, a civil protection order is easier to obtain than a criminal conviction.[66]

A primary advantage that protection order legislation affords is a victim's access to temporary protection in emergency situations[67] until a court issues a permanent order. In contrast, when victims seek criminal sanctions, their assailants are often released on bond, giving the defendant an opportunity to intimidate the victim into refusing to testify.[68] Additionally, the defendant has the opportunity to commit additional acts of violence. By allowing emergency ex parte orders, protection order legislation can give victims the security they need to pursue a permanent order or criminal charges.[69] Furthermore, it may take months for a

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63. Ex-wives and ex-girlfriends constitute more than ninety percent of stalking victims. Bruce Rubenstein, *Stalker a Danger to Himself and Others; But He May Go Free*, ILL. LEGAL TIMES, June 1992, at 18.

64. Grau, *supra* note 12, at 710; Topliffe, *supra* note 11, at 1042.

65. Topliffe, *supra* note 11, at 1043.

66. Grau, *supra* note 12, at 712-13; Topliffe, *supra* note 11, at 1048.

67. Topliffe, *supra* note 11, at 1047 (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2 (1990)).

68. *See id.*, wherein Topliffe notes: "This accounts for the large number of criminal domestic violence cases where the charges are dismissed, the victim refuses to testify, or the victim otherwise refuses to cooperate. 'In studies of courts operating under regular assault statutes, investigators have typically found that approximately 80% of all cases of domestic violence are dismissed by the court either at the victim's request or because the victim failed to appear in court.'" (quoting C. SCHWEBER & F. FEINMAN, CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF THE LEGALLY MANDATED CHANGE 33 (1985)).

69. *Id.* at 1048.

criminal case to come to trial, while victims may obtain protection orders without delay.[70]

Another benefit of civil protection orders is that they empower victims of domestic violence to determine the type of remedy appropriate for their particular circumstances.[71] In certain circumstances, victims may not wish to consider criminal sanctions. As one commentator noted: "Many women in domestic violence situations do not want their assailant jailed or criminally charged because he may be the only source of support for the victim or her family."[72] In addition, many victims fear severe retaliation if they file criminal charges.[73]

In contrast to a criminal proceeding, another advantage afforded by protective orders is that the burden of proof for a civil proceeding is lower.[74] Thus, even if the available evidence cannot sustain a criminal conviction, the victim may still be able to secure relief through a protective order. This can be crucial where the victim and the assailant are the only witnesses to the crime and there is little or no extrinsic evidence.[75] Also, a protective order can prevent an assailant from committing non-criminal acts, such as harassment.[76] Consequently, a civil protection order may be the only source of relief to victims unable or unwilling to bring criminal charges.

Civil protection orders have some advantages over criminal proceedings and may be the only option available to prevent future acts of violence in certain situations. Nonetheless, considering the need to prevent intimidation and violence connected with stalking conduct, protective orders fail to meet the needs of these victims.

C. Disadvantages of Civil Protection Orders in Preventing Stalking Conduct

While civil protection orders may be a viable remedy for domestic violence in many circumstances, when considering the broad spectrum of abusive conduct accompanying stalking behavior, protective order legislation is often not accessible or is simply inadequate to protect

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70. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990)).

71. *Id.* at 1048.

72. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990)).

73. *Id.* (citing C. SCHWEBER & F. FEINMAN, CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF THE LEGALLY MANDATED CHANGE 33 (1985)).

74. Grau, *supra* note 12, at 712-13; Topliffe, *supra* note 11, at 1048.

75. Topliffe, *supra* note 11, at 1048.

76. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990)).

victims. Many stalking victims are prevented access to protective orders by statutory qualifications. Procedural requirements may also bar access to protective orders. Furthermore, even when victims can obtain protective orders, enforcement of the orders and sanctions for violations are often insufficient to deter future abuse.

Because protective order legislation is targeted at domestic violence, an entire class of victims is statutorily precluded from this source of relief. As stated above, many jurisdictions limit access through the statutory requirement of a relationship between the victim and the assailant.[77] Consequently, stalking victims who do not know or have only an informal acquaintance with the perpetrator are often outside the reach of protective order legislation. Stalking victims who are not eligible for protection orders are frequently told that nothing can be done until they are physically harmed or a suspect has committed a criminal act. By that time, a serious assault or homicide may have occurred.[78]

Even where the statutorily-required relationship exists or is not required, a state may still deny the victim a protective order if the abuse is psychological in nature,[79] or fails to meet the statutory definition of abuse.[80] A perpetrator might therefore limit his or her conduct so as not to exceed the statutory threshold, instead subjecting a victim to continued harassment which may lead to a final act of serious violence. Some have advanced that restraining orders effectively reduce harassment and verbal abuse, but do not reduce physical violence which the orders were designed to prevent.[81]

Although a victim may be within the statutory reach of protective order legislation, procedural requirements can still limit access. Victims may be dissuaded by the filing fee or lack of special assistance to understand the complexities of the legal steps involved in obtaining an order.[82]

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77. Grau, *supra* note 12, at 706-07.

78. Louise Palmer, *Maine Woman Stalked For Eight Years*, STATES NEWS SERVICE, Sept. 29, 1992.

79. Grau, *supra* note 12, at 706.

80. *Id.*

81. *Id.* at 726.

82. Topliffe, *supra* note 11, at 1044-45 ("To get an order, a woman must pay filing fees or complete extensive forms requesting a fee waiver. She must also pay to have her batterer served. Then she must share her personal stories with strangers, including her own counsel, prosecutors, court clerks, and judges. Finally, she must appear at a hearing and testify against the batterer. If the batterer violates the order, she often has to go through the same process in order to file civil contempt charges. Many women give up in frustration with the whole system." (citing D. MARTIN, BATTERED WIVES 107-109 (1976)).

Once a victim obtains a protective order, often it is not effectively enforced.[83] Jurisdictions vary on their response to violations, but three disturbing patterns are apparent: frequently the police will not respond until after violence has occurred; courts often have discretion whether to hold the assailant in contempt when an order is violated; and finally, there may be no formal guidelines for dealing with violations.[84] When enforcement is ambiguous and ineffective, an assailant may continue his or her abusive conduct without fear of legal sanctions.

Even if a protective order is available and enforcement is consistent, there remains the question of whether the type of individual who commits stalking behavior will be deterred.

> The world is all too full of aggressive, impulsive individuals who are willing to take risks in order to vent their temper or get their way. They are often poorly educated and lack solid judgment and planning skills. Many are convicted criminals who have outgrown their fear of jail and have no interest in protecting their reputations or arrest histories. Some are mentally disturbed, and others have grown so depressed or bitter that they simply don't care anymore. These types of individuals are not impressed by the risk of short-term incarceration, although for some of them, genuinely harsh sanctions such as lengthy prison sentences may have deterrent value. For most, though, a short-term arrest will have virtually no effect on curbing future domestic violence, just as a short-term arrest has relatively little effect at preventing their participation in drug offenses, robberies, burglaries, and other crimes.[85]

The motivation of an assailant willing to stalk and terrorize a victim over a prolonged period suggests that even the maximum sanctions available for violation of a protection order may be an insufficient deterrent. Moreover, "ninety percent of all stalkers suffer from at least one kind of mental disorder, including different forms of obsession and

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83. *Id.* at 1046 (citing D. MARTIN, BATTERED WIVES 107-09 (1976)).

84. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 49 (1990)) ("Despite the widespread belief that the effectiveness of civil protection orders depends largely on their enforceability, few of the courts we studied have developed guidelines or procedures for punishing violators. As a result, there remains a great deal of confusion with regard to arrest authority and appropriate sanctions for protection order violations.") (quoting P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2 (1990)).

85. David B. Mitchell, *Contemporary Police Practices In Domestic Violence Cases: Arresting The Abuser: Is It Enough?*, 83 J. CRIM. L. & CRIMINOLOGY 241, 243 (1992).

delusion."[86] Thus, many perpetrators of stalking behavior simply will not be dissuaded from committing additional acts of abuse by the threat of a civil contempt or misdemeanor charge.

D. Civil Protection Order Legislation is Insufficient to Deter Stalking Conduct

States formulated civil protection orders in response to the rising incidence of domestic violence. The statutory structure of civil protection order legislation demonstrates that states developed these laws as a means to protect individuals who are, or were, previously involved in a relationship with their abuser. In domestic abuse cases, civil protection orders may have a sufficient deterrent value in some circumstances,[87] but are simply inadequate to prevent abuse in many other situations.

Beyond the problems of access and enforcement of protective order legislation, many stalking victims have complained that even with protective orders their assailants continue to harass and threaten them.[88] While existing laws against trespassing and harassment are helpful in supplementing protective orders, they frequently are insufficient to completely protect potential victims until it is too late.[89] Clearly, other options are needed to protect stalking victims from perpetual intimidation and violence. Anti-stalking enactments have been the legislative response to the perceived inadequacies of protective orders. These new laws purportedly offer relief that complement civil protection legislation.

II. Anti-Stalking Legislation as a Means to Meet the Inadequacies of Civil Protection Orders

In 1990, California became the first state to enact anti-stalking legislation.[90] This law served as a model for subsequent legislation. Many

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86. Palmer, *supra* note 78 (quoting Sen. Bill Cohen).

87. "[S]pousal assault, unlike almost any other type of violent crime, cuts across the broad spectrum of society. Not only do some career criminals and other reckless persons abuse their spouses, but so do some well-educated, successful, and normally law-abiding individuals. For the educated, successful, and law-abiding group of offenders, a short-term arrest coupled with all of its ramifications may be an immensely powerful deterrent. These abusers have much at stake and could be seriously injured by a permanent record of arrest or conviction. Employment potential, eligibility for membership [in] social organizations, political viability, and general social reputation are all threatened by arrest." Mitchell, *supra* note 85, at 244.

88. Anderson, *supra* note 6, at D1 ("One stalking victim, who testified to lawmakers, complained that she and her three children have been stalked by her former husband for more than six years. The victim stated that she had been beaten, abducted, raped and shot at by the man, who repeatedly has violated court orders to stay away from her family."); *see also* Court, *supra* note 1, at 110; Palmer, *supra* note 78; Kolarik, *supra* note 2, at 35.

89. *Cooperative Agreement*, *supra* note 8 (citing Charles B. DeWitt, Director, National Institute of Justice).

90. Cal. Penal Code § 646.9 (West Supp. 1992).

states have followed California's lead in criminalizing stalking behavior.[91] Prior to the current legislation, individuals who were stalked and sought protection often faced an unsympathetic judicial system that traditionally classified such violence as a domestic matter.[92] Anti-stalking statutes are a legislative attempt to afford victims protection from certain types of conduct that were previously not criminal or were inadequately deterred.

A. Anti-Stalking Laws: How They Operate

In contrast to a violation of a restraining order, committing acts categorized as stalking in an anti-stalking statute is a criminal act, which can result in a state-initiated proceeding against the perpetrator. In order for a victim to file charges, the abuser's actions must fall within the statutory definition of stalking conduct.

The statutory definition of stalking varies among the states. California, the first state to enact such legislation, describes a stalker as "any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury."[93] The California law additionally defines "harasses" and "course of conduct" to refine the breadth of the legislation.[94] Although the California law

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91. Andrews, *supra* note 4. State statutes which criminalize stalking include: ALA. CODE § 13A-6-90 (Supp. 1993); CAL. PENAL CODE § 646.9 (West Supp. 1992); 1992 COL. REV. STAT. § 18-9-111 (1993); CONN. GEN. STAT. ANN. §§ 53a-181c to 53a-181d (West Supp. 1993); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. § 16-5-90 (Michie Supp. 1993); HAW. REV. STAT. § 711.1106.5 (Michie Supp. 1993); 1992 IDAHO CODE § 18-7905 (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993); IND. CODE ANN. § 35-45-10-5 (West Supp. 1993); 1992 IOWA CODE ANN. § 708.11 (West Supp. 1993); 1993 Kan. Sess. Laws 291; KY. REV. STAT. ANN. §§ 508.130 to -.150 (Baldwin 1992); 1992 LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993); MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993); MISS. CODE ANN. § 97-3-107 (Supp. 1993); NEB. REV. STAT. § 28-311.02 (Supp. 1993); N.C. GEN. STAT. § 14.277.3 (Supp. 1992); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); N.M. STAT. ANN. §§ 30-3A-1 to -2 (Michie Supp. 1993); OHIO REV. CODE ANN. §§ 2903.21.1 to .5 (Anderson 1993); OKLA. STAT. tit. 21, § 1173 (West Supp. 1993); R.I. GEN. LAWS §§ 11-59-1 to -2 (Michie Supp. 1993); 1992 S.C. ACTS § 16-3-1070; S.D. CODIFIED LAWS ANN. § 22-19A-1 to -6 (Supp. 1993); TENN. CODE ANN. § 39-17-315 (Supp. 1993); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992); VT. STAT. ANN. tit. 13, § 1061-3 (Supp. 1993); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); W. VA. CODE § 61-2-9a (Michie Supp. 1993); WYO. STAT. § 6-2-506 (Michie Supp. 1993).

92. Palmer, *supra* note 78 (quoting Sen. Biden).

93. CAL. PENAL CODE § 646.9 (West Supp. 1992).

94. *Id.* The relevant portion of the statute is as follows:

(d) For the purposes of this section, "harasses" means a knowing and willful

has served as an example for subsequent legislation, many states have broadened or narrowed the reach of their respective statutes through legislative definitions and statutory structure.

States have extended the reach of their statutes beyond California's version by various means. Some jurisdictions have done this by eliminating the requirement of intent to place the victim in fear of death or great bodily injury.[95] Legislation has also been broadened by expanding the classification of potential abuse beyond death or great bodily injury.[96] A few states have gone so far as to eliminate both intent and the requirement that the victim be placed in fear of harm.[97] Most states that mandate the victim be placed in fear of harm use an objective standard of reasonableness, but some jurisdictions additionally impose a subjective test.[98] A related requirement is that the threat be credible.[99]

The breadth of anti-stalking legislation has been limited in some jurisdictions by narrowing the definition of stalking conduct. While mandating intent to place the victim in serious bodily harm or injury is a typical provision,[100] some states further require that the victim be placed in "imminent fear" of the proscribed abuse.[101] This imposes a greater burden on a victim wishing to file criminal charges against an assailant who employs a low level of intimidation. One of the more limited laws, passed by West Virginia, also requires the victim to have formerly resided or cohabitated with the perpetrator.[102]

All jurisdictions require repeated conduct by a perpetrator in order to qualify as stalking. Generally, there must be some "course of conduct" involving a pattern of behavior composed of two or more separate

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course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "Course of Conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct.

95. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993) (no intent required).

96. *E.g.*, *id.* (includes harassment that would cause the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested).

97. In Idaho, a stalker is defined as any person who willfully, maliciously and repeatedly follows or harasses another person or a member of the other person's immediate family. IDAHO CODE § 18-7905 (Supp. 1992).

98. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993) (requires a victim to actually feel terrorized, frightened, intimidated, threatened, harassed, or molested).

99. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

100. *E.g.*, *id.*

101. *E.g.*, MASS. GEN. L. ch. 265, § 43 (West Supp. 1992).

102. W. VA. CODE § 61-2-9a (Michie Supp. 1993).

noncontinuous acts evidencing a continuity of purpose.[103] This demands a deliberate plan or relationship between the acts, not just unconnected coincidental encounters.

The type of conduct that an abuser must commit may be defined generally or specifically. The majority of states focus on the victim being placed in fear of death or serious bodily injury in conjunction with conduct generalized as following or harassing.[104] Some states specifically describe the type of behavior and where it must occur.[105] A few jurisdictions are very expansive in their descriptions, including such acts as: appearing within the sight of the victim; making contact by telephone; making contact by mail; and placing an object on property owned by the victim.[106] While reaching a wide variety of conduct, the majority of statutes still require that the victim be placed in fear of serious harm.[107]

Most statutes are designed to work in tandem with restraining order legislation. Some anti-stalking enactments simply state that when an assailant violates a restraining order or injunction that prohibits the conduct defined as stalking, states will punish the violation as stalking.[108] A more recent trend is to impose enhanced sanctions for stalking conduct when committed in violation of a protective order.[109] This may upgrade the classification of the offense, increasing the jail term or fine if a state obtains a conviction.[110]

Many jurisdictions have provided for an additional offense within their legislation typically called "aggravated stalking."[111] Generally, a

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103. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

104. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

105. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993). The relevant portion of the statute is as follows:

> (a) A person commits stalking when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions:
>
> (1) follows the person, other than within the residence of the defendant;
>
> (2) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant.

106. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

107. *E.g.*, *id.*

108. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

109. Some anti-stalking statutes which provide for enhanced sanctions for stalking when committed in violation of a restraining order include: FLA. STAT. ch. 208, § 784.048 (1992); ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993); MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

110. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

111. Some examples of statutes that provide for an aggravated stalking offense are

person commits aggravated stalking when he or she does certain specified acts in conjunction with committing the crime of stalking.[112] For example, Illinois' statute requires one of the following: causing bodily harm to the victim; confining or restraining the victim; or violating a restraining order, order of protection, or an injunction.[113] Some states expand the offense to cover subsequent stalking in the face of a prior conviction, or in violation of a condition of probation, pretrial release, or release on bond pending appeal.[114] At least one state with a low threshold definition of stalking imposes an aggravated charge when a credible threat with the intent to place the victim in reasonable fear of death or bodily injury occurs.[115] An aggravated stalking violation can substantially increase the classification of the crime and result in severe sanctions, including increased prison terms and large fines.[116]

Some states exempt certain conduct from their anti-stalking legislation to avoid criminalizing legal behavior and invoking constitutional scrutiny.[117] Several statutes exempt activity that is constitutionally protected.[118] A few states exclude specific activity, such as picketing occurring at the workplace.[119]

Some anti-stalking statutes alter the standard procedure for arrest. The Florida statute allows any law enforcement officer to arrest, without warrant, any person he or she has probable cause to believe committed a stalking offense.[120]

Pre-trial detention may also be a subject of stalking legislation. Illinois provides for the denial of bail to an individual charged with stalking or aggravated stalking in certain situations.[121] This provision allows a hearing to determine whether bail should be denied when it is alleged that the defendant's admission to bail poses a real and present threat to the safety of the alleged victim, and denial of release on bail is necessary to prevent fulfillment of the threat upon which the charge is based.[122] A controversial section of this provision provides that during the hearing, the defendant may not make a motion to suppress evidence

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as follows: FLA. STAT. ANN. § 784.048 (West Supp. 1993); ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

112. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
113. *Id.*
114. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).
115. FLA. STAT. ANN. § 784.048 (West Supp. 1993).
116. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
117. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).
118. *E.g., id.*
119. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
120. FLA. STAT. ANN. § 784.048 (West Supp. 1993).
121. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
122. *Id.*

or a confession, even in the face of evidence that the proof may have been obtained as the result of an unlawful search and seizure or through improper interrogation.[123] Any denial of bail must be supported by clear and convincing evidence,[124] a lower standard than beyond a reasonable doubt. A denial of bail will leave the defendant incarcerated pending trial for the stalking offense.[125] The defendant must be brought to trial within ninety days after the date on which the order for detention was ordered.[126]

The effort necessary to obtain a conviction for stalking varies according the structure of the legislation. As a criminal charge, the ultimate finding against a defendant must be beyond a reasonable doubt. In states where specific intent is required, it will obviously be more difficult to convict an assailant.[127] The ability to obtain a conviction may also be limited by the statutory designation of abuse that the victim must be put in fear of. Where the victim must be placed in fear of bodily injury or death,[128] a low level of intimidation may fail to convince a jury that the perpetrator intended to commit actual violence. Conversely, where a victim is only required to be terrorized, intimidated, threatened, harassed, or molested, even moderate conduct by an assailant may support a guilty verdict.[129]

States requiring that the victim be put in reasonable fear of the proscribed conduct normally employ an objective standard.[130] However, in one state that additionally requires a subjective test, evidence that the defendant repeatedly engaged in unconsented conduct after being requested to cease such conduct gives rise to a rebuttable presumption that the continuation of conduct caused the victim to be in actual fear of the statutorily-prohibited abuse.[131]

If a court convicts an assailant of stalking, the punishment will vary by jurisdiction. A first time stalking offense is a misdemeanor in many states.[132] A misdemeanor conviction for stalking is typically punishable by imprisonment for not more than one year or a fine of not more than $1,000.[133] An exception is Illinois, which treats a first time offense as a class four felony with fines up to $10,000 and a jail term up to

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123. *Id.*
124. *Id.*
125. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
126. *Id.*
127. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).
128. *E.g.*, *id.*
129. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).
130. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).
131. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).
132. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).
133. *E.g.*, *id.*

three years.[134] At least one state raises the classification from a misdemeanor to a felony when the crime involves a victim under the age of sixteen.[135]

States vary even more on the issue of punishment of second offenses. Generally, in the states that do not classify a subsequent offense as aggravated stalking, they nonetheless impose an enhanced sanction.[136] Most of these states upgrade the offense to a felony,[137] and may impose a mandatory jail term upon conviction.[138] A prison sentence for a second conviction normally will not exceed five years incarceration;[139] however, one state allows the possibility of a ten year prison sentence.[140]

Aggravated stalking, like a conviction for a second offense, results in greater sanctions. Normally, an aggravated stalking conviction is a felony imposing a longer prison term or a larger fine.[141] Some states increase the classification when the prohibited conduct is repeated. For example, Illinois makes an aggravated charge a "class three" felony, but a subsequent aggravated offense is designated as a "class two" felony.[142]

A few states provide additional remedies under their anti-stalking legislation. States give some courts discretion to order an individual who was convicted, as a condition of parol, to receive psychiatric, psychological, or social counseling at his or her expense.[143] At least one jurisdiction grants authority to issue permanent anti-stalking orders as a condition of parol when the conviction was for an aggravated charge.[144]

The rapid nationwide growth of anti-stalking legislation would appear to indicate a widespread belief in its potential effectiveness. Nonetheless, there are many critics who voice concerns regarding the constitutionality and effectiveness of these statutes.

B. Criticisms of Anti-Stalking Legislation

The speed at which legislatures are enacting anti-stalking legislation has prompted many civil libertarians[145] and criminal defense attorneys[146]

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134. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
135. CONN. GEN. STAT. ANN. §§ 53a-181c to 53a-181d (West Supp. 1993).
136. *E.g.*, MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).
137. *E.g.*, IDAHO CODE § 18-7905 (Michie Supp. 1992).
138. MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).
139. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
140. MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).
141. *E.g.*, FLA. STAT. ANN. § 784.048 (West Supp. 1993).
142. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
143. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).
144. *Id.*
145. "It is always troubling for civil libertarians to see laws enacted in the fog and

to question the legitimacy of some of the particular statutes that have been passed. These critics cite possible constitutional problems resulting from overbroad legislation and vague statutory terminology.[147] There is additional concern that some legislation which incorporates revised arrest and pretrial detention provisions will be susceptible to abuse by vindictive ex-spouses or lovers.[148] Conversely, some commentators have focused criticism on statutory language that is too narrow to protect stalking victims effectively.[149] Some also have suggested that stalking perpetrators need psychological counseling, not incarceration.[150] The national scope of these concerns is reflected in bills pending before the United States Congress, which seek to develop a model state law on stalking that addresses how to protect a victim without violating the accused's constitutional rights.[151]

Courts may strike down a law as being overbroad or void for vagueness.[152] "Generally, the Supreme Court has struck down laws that are vague to the point that it is difficult to discern objectively the difference between an individual who is acting legally and one who is acting illegally."[153] A law may be overbroad if it sweeps within its ambit a substantial amount of constitutionally protected activity.[154] Where the reach of a statute is unclear or overbroad, individuals such as insurance investigators or reporters could technically fall within the definitional scope of stalking conduct.

If a court finds a statute is unconstitutional, anyone previously convicted under the legislation will be released.[155] Some legislators have

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frenzy of recent high-publicity cases." Kolarik, *supra* note 2, at 35 (quoting Jonathan Turley, a professor at George Washington University National Law Center).

146. One defense attorney called the Illinois stalking statute the outcome of a "legislative frenzy." *Id.* at 36 (quoting Lake County, Ill., Public Defender Joseph V. Collina).

147. *See id.* at 36. *See also* Rosalind Resnick, *States Enact "Stalking" Laws; California Takes Lead*, NAT'L L.J., May 11, 1992, at 3. *See also* Spencer, *supra* note 3, at 1.

148. Kolarik, *supra* note 2, at 36. *See also* Curtis Lawrence, *First Stalking Trial Results In Acquittal*, CHI. TRIB., Dec. 19, 1992, at 5.

149. *See generally* Palmer, *supra* note 78.

150. *See* Kolarik, *supra* note 2, at 36.

151. Louise Palmer, *Cohen's Anti-stalking Bill Passes Senate,* STATES NEWS SERVICE, Sept. 16, 1992. Bills recently presented to the United States Congress include: S. 2922, 102d Cong., 2d Sess. (1992); S. 3271, 102d Cong., 2nd Sess. (1992); H.R. 5876, 102d Cong., 2d Sess. (1992); H.R. 5960, 102 Cong., 2d Sess. (1992).

152. Kolarick, *supra* note 2, at 36. *See also* Palmer, *supra* note 151.

153. Kolarik, *supra* note 2, at 36 (quoting Jonathan Turley, a professor at George Washington University National Law Center).

154. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

155. "The problem with some of these statutes, and with Florida's in particular,

attempted to address this problem by specifically exempting constitutionally protected activity,[156] but the actual determination of whether the activity is protected may still subject an accused to the judicial system.

Certain statutes have particular provisions that raise other constitutional considerations. Many have criticized stalking legislation that permits an arrest without a warrant.[157] The Illinois statute, which provides for the denial of bail in some circumstances,[158] is particularly suspect.[159] Evidence rules do not apply at the bail hearing and evidence may be based upon "reliable information."[160] Supporters of the bond provision have countered that the burden of proof remains with the state.[161]

Anti-stalking legislation may be susceptible to abuse by vindictive ex-spouses or lovers.[162] Some critics claim that the law favors the person who presses charges.[163] It can be difficult for a defendant to disprove allegations of stalking because frequently there are no witnesses.[164] When a state allows a conviction based entirely upon the victim's word, it may raise constitutional questions which could ultimately result in the statute's invalidity.[165]

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is that they will not pass constitutional muster. I think the Florida Legislature was well-intentioned, but, unfortunately for the victims, by writing a statute which is unconstitutional, they are ensuring that any stalker convicted under the statute will ultimately go free." Resnick, *supra* note 147, at 3 (quoting Jeffrey S. Weiner, president of the National Association of Criminal Defense Lawyers).

156. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

157. "Usually, probable cause and a warrant are required, unless a crime is occurring in the presence of a police officer or there are other exigent circumstances." Kolarik, *supra* note 2, at 36 (quoting Jonathan Turley, a professor at George Washington University National Law Center).

158. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

159. In a recent case, an alleged stalker spent 132 days in jail based on allegations by his ex-wife. The case eventually went before a jury and the defendant was acquitted. Lawrence, *supra* note 148, at 5.

160. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993). A public defender has stated that the bail provisions violate the Eighth Amendment, which prohibits excessive bail. "The law also has a provision where a defendant may not challenge . . . involuntary statements or illegally obtained evidence until trial. That is why we have the exclusionary rule, which was made to discourage pretrial incarceration based on tainted evidence." Kolarik, *supra* note 2, at 36 (quoting Lake County, Ill. Public Defender Joseph V. Collina).

161. "The burden of proof is upon the state. The test of the new law will be at trial and the gathering of collaborating witnesses to convict someone of stalking." Kolarik, *supra* note 2, at 36 (quoting Cook County State's Attorney Jack O'Malley).

162. *Id. See also* Lawrence, *supra* note 148, at 5.

163. Jennifer Lenhart, *Cops Beginning To Get Handle On Stalking Law,* CHI. TRIB., Nov. 30, 1992, at 1 (citing attorney Richard B. Harty).

164. "It's pretty hard to defend yourself against some phone calls that were allegedly made, or someone saying they saw you in a parking lot." *Id.* (quoting attorney Richard B. Harty).

165. *See* Resnick, *supra* note 147, at 3.

In contrast to questions of constitutionality, some critics have directed complaints at statutes which they claim are too narrow to protect the victim adequately.[166] In states that require "imminent" fear of death or serious bodily injury, statutory protection may be unavailable until it is too late.[167] Some jurisdictions' statutory definitions of stalking may leave an entire class of victims out of the scope of the legislation.[168]

There has also been some debate about whether incarceration is the proper penalty for stalkers. Some have argued that when stalkers are released from prison, they are more angry than when they entered.[169] These critics suggest that people who stalk need psychological help, not jail.[170]

Concerns regarding the effectiveness and constitutionality of various anti-stalking statutes have led the United States Congress to consider several bills that seek to evaluate existing legislation.[171] Congress' eventual goal is to develop a model state law that would protect the victim while not infringing upon the accused's constitutional rights.[172] Although there are many unanswered questions concerning the validity and efficiency of anti-stalking legislation, advocates still proclaim that the advantages outweigh the potential problems.

C. The Advantages of Anti-Stalking Legislation in Supplementing Civil Protection Orders

Although largely untested, anti-stalking legislation is widely supported by prosecutors,[173] organizations concerned with domestic violence,[174] and the police.[175] Stalking statutes are a means to stop abusive and violent behavior that was previously not criminal or was inadequately deterred

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166. *See* Palmer, *supra* note 78.

167. *E.g.*, MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

168. *E.g.*, W. VA. CODE § 61-2-9a (Supp. 1992) (requires the victim to have formerly resided with the perpetrator).

169. Kolarik, *supra* note 2, at 36 (quoting Joseph V. Collina, Lake County, Ill. Public Defender).

170. *Id.*

171. For a list of some of the bills recently considered by the United States Congress, see *supra* note 151.

172. *See generally* Palmer, *supra* note 78.

173. *See* Kolarik, *supra* note 2, at 36.

174. *See* Anderson, *supra* note 6, at D1.

175. "The stalking law is supported nationally by police chiefs and police associations. It doesn't give police more power in making judgment calls on who is a stalker or not, but it does allow us to bring an alleged stalker into the station to see if there is enough evidence for charges instead of doing nothing. It is a deterrent and lets people know that threats are taken seriously." Kolarik, *supra* note 2, at 36 (quoting Elmhurst, Ill., Police Chief John Milner).

through the use of civil protection orders. Anti-stalking laws normally complement civil protection order legislation by working in conjunction with existing restraining orders and providing other options for stalking victims. Most stalking statutes largely meet the inadequacies inherent in civil protection order legislation.

One of the primary advantages that anti-stalking legislation affords is that it criminalizes conduct that previously was not illegal. Protective order legislation normally does not extend to psychological abuse,[176] and often does not cover threats of future violence.[177] Some protective order legislation requires the commission of actual violence before a victim is statutorily eligible for such an order.[178] In contrast, anti-stalking legislation allows police action in the face of threats or psychological abuse that place victims in fear for their life or of bodily harm.[179]

Even when abusive conduct is within the scope of protective order legislation, a state may often deny a victim's access to it because some statutes require a relationship between the victim and the alleged stalker.[180] These restrictions eliminate protection to an entire class of victims. By comparison, states formulated most anti-stalking legislation to reach both victims of domestic violence and those who have no prior relationship with their attacker.[181]

Anti-stalking statutes eliminate other barriers present in protective order legislation, such as filing requirements to obtain a restraining order or to bring a civil contempt charge.[182] As a criminal charge, the process is state-initiated and therefore the victim's burden is substantially reduced.

The inconsistent enforcement of civil protection order violations presumably will not be a characteristic of anti-stalking legislation. Because stalking is a criminal violation, police employ standard arrest procedures rather than the more uncertain actions that can be taken when a civil order is violated.[183] In addition, some statutes allow arrest without a warrant, which results in the immediate detention of an assailant when probable cause is present.[184] When the jurisdiction provides for the refusal of bail in appropriate circumstances,[185] it denies the assailant the op-

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176. Grau, *supra* note 12, at 706.

177. Topliffe, *supra* note 11, at 1043 (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 12-13 (1990)).

178. *Id.*

179. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

180. Grau, *supra* note 12, at 706-07.

181. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

182. Topliffe, *supra* note 11, at 1044.

183. *See* text accompanying note 84 *supra*.

184. *E.g.*, FLA. STAT. ANN. § 784.048 (West Supp. 1993).

185. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

portunity to commit acts of violence or intimidation prior to his or her trial.

Sanctions found in stalking legislation are generally more severe than the penalties for civil protection order violations. Most statutes allow imprisonment of up to one year for stalking.[186] Subsequent offenses or an aggravated charge substantially increase the penalties.[187] These sanctions should provide the deterrence lacking in protective order legislation to prevent acts of violence and intimidation in many situations. Where the deterrence is insufficient, stalking legislation has the potential to remove the threat of future violence by placing the assailant in prison. Although no law will be sufficient to deter all individuals from committing acts of violence, anti-stalking legislation goes much further than protective orders in terms of preventing violence or removing the threat if abuse has occurred.

D. Additional Methods to Increase the Effectiveness of Anti-Stalking Legislation

Some states recently have experimented with other means to increase the effectiveness of anti-stalking legislation and domestic violence legislation in general. There are also additional measures that could be taken to secure the protection of stalking victims.

At least one state is employing technology to facilitate it's anti-stalking legislation. Colorado is experimenting with an electronic system that sets off an alarm when a stalker approaches his or her victim.[188] The system requires known offenders to wear an electronic ankle bracelet.[189] If the stalker approaches, an alarm sounds on a receiver near the victim and sends a simultaneous signal to a communication center, which in turn alerts police.[190] The victim also has a "panic button" on the receiver if the assailant disconnects the bracelet before approaching.[191]

Some additional measures taken to combat domestic violence would also be beneficial to stalking victims. Massachusetts has funded a computerized system to track assailants who violate protective orders.[192] In addition, Massachusetts' domestic violence program includes court confiscation of weapons from alleged abusers, and requires that victims of

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186. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).
187. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).
188. *Technology Takes Aim At Stalkers,* CHI. TRIB., Sept. 20, 1992, at 4.
189. *Id.*
190. *Id.*
191. *Id.*
192. Kolarik, *supra* note 2, at 36.

crime be notified that they can file criminal complaints as well as request restraining orders.[193]

Another method that might enhance the protection of stalking victims would be to alter the common law rules governing the privilege of self-defense. These rules are often restrictive with regard to when an individual may use a weapon in self-defense.[194] Normally, states require an "imminent" threat, and defenders may not use a weapon unless he or she reasonably fears death, great bodily harm, or a forcible felony from an attacker.[195] These rules have considerable validity for governing encounters with strangers,[196] but one may question whether it makes sense to apply them in the same way to situations involving stalkers. Often victims will intimately know their assailants, and will have far less uncertainty about the probable behavior of the attacker.[197] Where the victim does not know, or only has a casual acquaintance with the attacker, repeated stalking conduct indicates great potential for violence in many situations. Perhaps states should lower the standard of self-defense in situations where the attacker is a demonstrated stalker.

A few states incorporate additional remedies to increase the effectiveness of stalking legislation, such as mandating psychological counseling for convicted stalkers.[198] These additional alternatives could further enhance the effectiveness of anti-stalking statutes in protecting victims of repeated abuse.

III. Conclusion

Prior to anti-stalking legislation, few options were available to victims of repeated abuse. States have employed civil protective orders as a means to eliminate stalking-type behavior, but this remedy was developed primarily as a means to address domestic violence. As a result, states denied many victims access to this form of protection. Even where civil protection orders were available, problems of enforcement and deterrence often made this remedy an ineffective option to many victims.

Anti-stalking statutes have been the legislative answer to the deficiencies of protection orders. States created this legislation to provide a viable option to stalking victims, who formerly had no effective protection through existing laws. Anti-stalking legislation reaches conduct that was previously either non-criminal or ineffectively deterred.

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193. Walker, *supra* note 17, at 1.

194. Daniel D. Polsby, *Suppressing Domestic Violence With Law Reforms,* 83 J. Crim. L. & Criminology 250, 252 (1992).

195. *Id.*

196. *Id.*

197. *Id.* at 253.

198. *E.g.,* Mich. Comp. Laws Ann. §§ 750.411h to 750.411ii (West Supp. 1993).

While largely untested, the rapid growth in anti-stalking legislation indicates a widespread belief in its potential to reduce the incidents of violence connected with stalking behavior. Nonetheless, this new legislation has been subject to concerns about its constitutionality and effectiveness. As a result, the real impact of stalking legislation may ultimately be determined in the courtroom.

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CASE NOTE

Is Justice Kennedy the Supreme Court's Lone Advocate for the Coercion Element in Establishment Clause Jurisprudence? An Analysis of *Lee v. Weisman*

Timothy C. Caress*

Introduction

The issue of invocations and benedictions[1] at public school graduations involves two contrary ideologies of Establishment Clause jurisprudence. Graduation prayer is a traditional practice that occurs in the special context of the public schools. This practice is best explained by the fact that, historically, education was a sectarian exercise.[2] Although the Supreme Court has tended to afford traditional practices great deference, it has applied the Establishment Clause with contrary rigor in public school cases.

The First Amendment was added to the Constitution as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say.[3] It was doubtless the belief in this guarantee that caused people to leave the officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could pray when they pleased, to the God of their faith, and

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1. "Prayers" will be used throughout this Note to refer to invocations and benedictions collectively.

2. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 238 n.7 (1963) (Brennan, J., concurring).

3. Engel v. Vitale, 370 U.S. 421, 429 (1962).

in the language they chose.[4] Therefore, the Establishment Clause of the First Amendment represents a protection fundamental to the ideals upon which the United States Constitution was founded: precisely, that each American shall be free to worship or not worship as he or she desires.

The Supreme Court has applied heightened scrutiny in Establishment Clause cases where the setting is public schools. The rationale for this intense scrutiny was illustrated almost fifty years ago:

> [It] is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.[5]

This Note examines the recent Supreme Court decision in *Lee v. Weisman*,[6] which held that invocations and benedictions at a public school graduation ceremony violated the Establishment Clause. Part I of this Note discusses the historical development of Establishment Clause jurisprudence and gives an overview of various approaches the Supreme Court has embraced in resolving Establishment Clause cases. Part II treats the facts and reasoning of *Lee v. Weisman*. It focuses on Justice Kennedy's application of the "coercion" test in the majority opinion and compares his test with the two concurring and the dissenting opinions. It also discusses the "coercion" test's probable effect on future Establishment Clause analysis. Finally, Part III concludes that the coercion element is the central issue in Establishment Clause inquiry, and attention directed to it will keep the protection granted by the First Amendment in appropriate historical context.

I. History and Development of Establishment Clause Jurisprudence

The Establishment Clause has long been the subject of vigorous debate over its meaning and scope of applicability. The First Amendment provides in relevant part, "Congress shall make no law respecting an establishment of religion. . . ."[7] Although the Clause is apparently straightforward and easily understood, its exact meaning has in fact

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4. *Id.* at 434.

5. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948).

6. 112 S. Ct. 2649 (1992).

7. U.S. Const. Amend. I. The remainder of the First Amendment's Religion Clause provides, "or prohibiting the free exercise thereof; . . . ." However, the focus of this Note is strictly confined to the establishment of religion clause and does not attempt to address the related free exercise of religion clause.

proved to be difficult to determine; consequently, numerous competing approaches have surfaced over the years. Justice Black captured the complexity of the problem in *Everson v. Board of Education*,[8] where he wrote:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."[9]

The height of Jefferson's "wall of separation" has varied over time and was even disputed in the *Everson* case.[10] Not surprisingly, the height of the wall continues to be the basis of intense debate even for the present Court.

As noted in the introduction, the Court has applied heightened scrutiny in its review of Establishment Clause cases involving public schools. In the early public school cases, the Court built a high "wall of separation."[11] However, more recently, the Court has found the "wall of separation" to be an inadequate basis for constitutional analysis.[12] Therefore, the Court has sporadically embraced various approaches other than the "wall of separation" to determine Establishment Clause cases. However, the Court remains deeply divided as to the proper approach.

A. The Lemon Test

In *Lemon v. Kurtzman*,[13] the Court established a three-prong test that a practice must satisfy to pass Establishment Clause scrutiny. First,

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8. 330 U.S. 1 (1947).

9. *Id.* at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 168 (1878)).

10. *Id.* at 18. Justice Black found that a New Jersey program to reimburse parents for their children's public transportation costs passed Establishment Clause muster, notwithstanding that some children attended catholic schools. *Id.* However, Justice Rutledge contended that the Framers originally intended the Establishment Clause "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 31-32 (Rutledge, J., dissenting).

11. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (holding classroom prayer and scripture recitation violated the protection afforded by the Establishment Clause).

12. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("[s]ome relationship between government and religious organizations is inevitable.").

13. 403 U.S. 602 (1971).

the practice must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the practice must not foster an excessive government entanglement with religion.[14] The *Lemon* test, if applied even-handedly, is a very strict approach and almost invariably leads to the conclusion that the challenged government interaction is unconstitutional. However, because of its hostility toward religion and the Court's failure to apply it even-handedly, the *Lemon* test has been severely criticized.[15] In fact, the *Lemon* test may no longer command support by a majority of the current Supreme Court.[16]

B. Modifications of the Lemon Test

1. Dropping the "Purpose" and "Entanglement" Prongs.—Some members of the Court have proposed modifying the *Lemon* test by eliminating the first prong, the requirement of a secular purpose, and by eliminating the third prong, excessive government entanglement. Chief Justice Rehnquist and Justice Scalia have urged that the "purpose" prong be dropped because: (1) it is not possible to determine legislative purpose;[17] and (2) the Court has not clearly defined the requirement of secular purpose.[18] Further, other members of the Court have blamed the "entanglement" prong for the inconsistent results of the Court's establishment rulings.[19] Although the Court has proposed dropping these

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14. *Id.* at 612-13. The *Lemon* court cited Board of Education v. Allen, 392 U.S. 236, 243 (1968) as the source of the "purpose" and "effect" prongs of the three-part test. The "entanglement" prong came from Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). For a discussion regarding other cases which also served as the basis for the *Lemon* test, *see* Wallace v. Jaffree, 472 U.S. 38, 108-09 (1984) (Rehnquist, J., dissenting).

15. *See* Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 108-13 (Rehnquist, J., dissenting); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 956 (1989). In fact, *Lemon* test disapproval is nearly universal: "[P]eople who disagree about nearly everything else in law agree that establishment doctrine is seriously, perhaps distinctively, defective." *See also* Rex E. Lee, *The Religion Clauses: Problems and Prospects*, 1986 B.Y.U. L. REV. 337 (1986); Michael W. McConnell, *The Religion Clauses of the First Amendment: Where is the Supreme Court Heading?*, 32 CATH. LAW. 187 (1988).

16. *See* Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting) ("The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it, . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.").

17. *Edwards*, 482 U.S. at 636-39.

18. *Id.* at 613-19.

19. *See, e.g.*, *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting).

two prongs of *Lemon*, it has not explicitly done so in the resolution of an Establishment Clause case.

2. The Endorsement Test.—A more prominent alternative to the traditional *Lemon* test is the "endorsement" test. This test was first presented in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*.[20] This shift in Establishment Clause analysis is essentially a clarification of the *Lemon* test rather than a new test[21] because it asks not whether an action advances religion, but whether the action conveys a message that the state endorses religion through the action.[22] The endorsement test has received some support by the Court since *Lynch*;[23] however, it, too, has failed to command support by a majority of the Court with any regularity or predictability.

3. The Marsh Exception.—Another alternative to the *Lemon* test was employed by a majority of the Court in the resolution of *Marsh v. Chambers*.[24] In that case, the Court determined whether an opening prayer at state legislative sessions by a state employed clergyman violated the Establishment Clause. The Court ignored the *Lemon* test and found the prayer to be a tolerable acknowledgement of religion and not a step toward an establishment of religion.[25] The linchpin of the Court's analysis seemed to be the unique history of legislative prayer.[26] Therefore, at

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20. 465 U.S. 668, 687 (1984).

21. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1147 (1988).

22. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). The primary consideration seems to be when the government has put its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. As was stated in *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring):

> [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

23. Grand Rapids School Dist. v. Ball, 473 U.S. 373, 389-90 (1985); Board of Educ. v. Mergens, 110 S. Ct. 2356, 2371-72 (1990); Edwards v. Aguillar, 482 U.S. 578, 587 (1987); County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989).

24. 463 U.S. 783 (1983).

25. *Id.* at 792.

26. The Court stated:

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. at 790.

least in *Marsh*, the Court was willing to relax the heightened scrutiny normally applied in Establishment Clause cases in favor of deferring to longstanding legislative practices. However, the precedential value of *Marsh* is uncertain as the Court has not extended its reasoning to any other Establishment Clause cases.

4. The Coercion Test.—Another possible successor to the *Lemon* test is the "coercion" test, which was recently advocated in the *County of Allegheny v. ACLU* case.[27] As explained by Justice Kennedy:

> Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefit to religion in such a degree that it in fact "establishes a [state] religion or religious faith or tends to do so."[28]

This test would permit the state to "endorse" religion, but it would prohibit actions that further the interests of religion through the coercive power of government.[29] As such, the coercion test would direct attention toward the actual effects of an action, rather than toward appearances; however, a discussion of the coercion test will be further developed in Part II of this Note.

II. *Lee v. Weisman*

A. Factual Background

The dispute in Lee v. Weisman[30] arose because principals of public middle and high schools in Providence, Rhode Island, were permitted to invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. Mr. Lee, a middle school principal, invited Rabbi Gutterman to offer such prayers at the graduation ceremony for Deborah Weisman's class. Further, Mr. Lee gave Rabbi Gutterman a pamphlet entitled "Guidelines for Civic Occasions," which contained guidelines for the composition of public prayers at civic ceremonies. It also advised that the prayers should be nonsectarian. Mr. Weisman, Deborah's father, filed a motion for a temporary restraining order to prohibit school officials from including a prayer in the graduation ceremony.[31] The motion was denied and Rabbi Gutterman recited the prayers as scheduled.[32] Subsequently, Mr. Weisman sought a permanent injunc-

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27. 109 S. Ct. 3086 (Kennedy, J., concurring in part and dissenting in part).
28. *Id.* at 3136 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
29. *Id.*
30. *Id.* at 2652.
31. *Id.* at 2654.

tion barring Mr. Lee, as well as other public school officials, from inviting clergy to recite prayers at future graduations. The District Court granted Mr. Weisman's request for a permanent injunction, which prevented the use of prayer at graduation ceremonies in the Providence public schools.[33] Thereafter, the First Circuit Court of Appeals affirmed the District Court's decision.[34]

B. Justice Kennedy's Majority Opinion[35]

Justice Kennedy wrote for the majority and determined that the recitation of the invocation and benediction did violate the Establishment Clause. Kennedy found it unnecessary to reconsider the Court's decision in *Lemon v. Kurtzman*[36] because he found the cases dealing with prayer in public schools to be controlling precedent.[37]

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32. The Invocation was as follows:

God of the Free, Hope of the Brave:

For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

For the liberty of America, we thank You. May these new graduates grow up to guard it.

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

Amen.

The Benediction was as follows:

O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of all of us: To do justly, to love mercy, to walk humbly.

We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

Amen.

Id. at 2652-53.

33. Weisman v. Lee, 728 F. Supp. 68 (D.R.I. 1990).

34. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

35. Justice Kennedy's majority opinion was joined by Blackmun, Stevens, O'Connor and Souter, J.J.

36. 403 U.S. 602 (1971).

37. *Lee*, 112 S. Ct. at 2655.

Justice Kennedy's resolution of the case was firmly rooted in the principles of the "coercion" test. His majority opinion stated:

> It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in any way which "establishes a [state] religion or religious faith, or tends to do so. . . . The State's involvement in the school prayers challenged today violates these central principles.[38]

However, before embarking on a full discussion of Kennedy's application of the "coercion" test in *Lee*, it is helpful to review generally the history of coercion as an essential element in Establishment Clause analysis and to note Justice Kennedy's modifications of the traditional interpretation of the coercion element.

1. History of the Coercion Element and Kennedy's Modifications.— The concern regarding religious coercion was deeply entrenched in the discussions of the First Amendment draftsmen. James Madison, the principal draftsman of the First Amendment's Religion Clauses, viewed the element of coercion as the essence of the Establishment Clause.[39] Additional support for the coercion element is found in Justice Souter's concurrence in *Lee*, where he stated that "[t]he Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion."[40]

The "coercion" test allows for some interaction between government and religion, although the height of the "wall of separation" is determined by the effects of a practice or action. Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits the government some latitude in recognizing and accommodating the role religion plays in our society.[41] The amount

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38. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).

39. In the debates concerning the wording of the First Amendment, Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONG. 730 (1984) (Aug. 15, 1789). Madison further stated that he "believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 731.

40. *Lee*, 112 S. Ct. at 2673.

41. County of Allegheny v. ACLU, 109 S. Ct. 3086, 3135 (1989) (Kennedy, J., concurring in part and dissenting in part). In *County of Allegheny*, this notion of permissible accommodation was supported by the following:

> It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that

of permissible latitude is not clearly defined; however, it is apparent that traditional practices receive expanded latitude regarding interaction with the religious sphere. As Justice Kennedy has stated: "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[42] This deference to traditional practices is further evidenced by the reasoning that a test for implementing the protections of the Establishment Clause should not invalidate longstanding traditions.[43]

The discussion above reflects the element of coercion generally; however, it does little to give any substance to what coercion means and how it is to be determined in a particular case. Strict interpretation of coercion would require "direct" coercion mandated by law.[44] However, Justice Kennedy has modified the strict interpretation of the coercion element. He would include within the definition "indirect" as well as "direct" coercion.[45] "Direct" coercion may be defined as government action that forbids or compels a certain behavior; "indirect" coercion is government action that merely makes noncompliance more difficult or expensive.

Justice Kennedy also maintains that "[s]peech may coerce in some circumstances, ..."[46] He explains this modification by stating that he

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> noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.
>
> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.

Id. at 3136 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring, joined by Harlan, J.)). The idea of permissible accommodation has received considerable support. *See, e.g.*, Wallace v. Jaffree, 472 U.S. at 113 (Rehnquist, J., dissenting).

42. *County of Allegheny*, 109 S. Ct. at 3138.

43. *Id.* at 3142.

44. For a more expanded discussion on the traditional interpretation of coercion, *see infra* notes 86-88 and accompanying text.

45. *County of Allegheny*, 109 S. Ct. at 3137 ("But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case.").

46. *Id.* As Chief Justice Burger wrote for the Court in *Walz*:

> The general principle deducible from the First Amendment and all that has been said by the court is this: that we will not tolerate either governmentally

would forbid government actions that would place the government's weight behind an obvious effort to proselytize on behalf of a religion.[47] Therefore, while Kennedy agrees with the traditional understanding of the "direct" coercion element, he has properly expanded the concept to include "indirect" coercion, thereby recognizing less obvious forms of religious coercion.

2. Kennedy's "Coercion" Test Applied to Lee v. Weisman.—Justice Kennedy's majority opinion is founded on two interlocking principles: first, the prayers were directed and controlled by the government and, second, the students' attendance at the graduation ceremony was not voluntary.[48] These two factual findings combine to produce a situation that fails the "coercion" test; therefore, the recitation of prayers is an unacceptable practice in violation of the Establishment Clause. These two findings, the government's direction and control of the prayers and involuntary student attendance, are discussed separately below.

Admittedly, the graduation prayers did not directly coerce the students to participate. However, this traditional interpretation was of little consequence for Justice Kennedy. He dismissed the rigid understanding of "direct" coercion when he stated:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.[49]

Therefore, this pressure to conform "put school-age children who objected in an untenable position."[50] While Justice Kennedy acknowledged that many people who have no desire to join a prayer have little objection to standing as a sign of respect, he insightfully recognized that:

> [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real.

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established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without interference.

Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

47. *Id. See also supra* note 45 (Although Kennedy used the term "symbolic" actions, it seems rather certain that speech is meant to be included within the meaning of this statement.).

48. Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992).

49. *Id.* at 2658.

50. *Id.* at 2657.

> There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the Rabbi's prayer.[51]

By so finding these prayers to be, in effect, "indirect" coercion, Justice Kennedy has prudently broadened the concept of coercion to include actions that are no less coercive than actions that directly mandate compulsion. He has prudently identified that coercion is present where "a reasonable dissenter . . . could believe that the group exercise signified her own participation or approval of it."[52]

Justice Kennedy's reasoning also relied heavily on the notion that the students' "attendance and participation in the state-sponsored religious activity are, in a fair and real sense, obligatory, though the school district does not require attendance as a condition for receipt of the diploma."[53] Again, Kennedy astutely expanded upon the traditional concept of voluntariness to recognize the importance of attending one's graduation ceremony.[54] He explained that "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions."[55] He further clarified his determination that attendance was not voluntary by stating:

> Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.[56]

Justice Kennedy's application of the concept of coercion to the *Lee* case persuasively demonstrates its utility in Establishment Clause cases. Focusing on the coercion element keeps Jefferson's "wall of separation" at an appropriate level within historical context. By demanding a form of coercion be present in a government action before a finding of an Establishment Clause violation,[57] the government is afforded some flex-

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51. *Id.* at 2658 (Justice Kennedy also recognized that it is of little comfort to the dissenter to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation.).

52. *Id.*

53. *Id.* at 2655.

54. *Id.* at 2659 (Kennedy reasoned that attendance was, in effect, not voluntary, evidenced by his seemingly obvious conclusion: "Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme.").

55. *Id.*

56. *Id.* A strict interpretation of "voluntary" would mean that attendance was voluntary so long as the school did not officially require attendance or penalize an absent student.

57. Justice Kennedy noted the "coercion" test demands just that—coercion. He

ibility and latitude to accommodate religion and recognize its importance to a large portion of the American population.

C. Justice Blackmun's Concurring Opinion[58]

Justice Blackmun's concurrence in *Lee* demonstrates that he would prefer a much higher "wall of separation" than would Justice Kennedy. He found the prayers to be an unconstitutional violation of the Establishment Clause on the premise that "[n]either a State nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another."[59] "Neither a State nor the Federal Government, openly or secretly, can participate in the affairs of any religious organization and vice versa."[60] He concluded that "[t]he Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."[61] Armed

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stated: "We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* at 2661. He acknowledged that Establishment Clause jurisprudence necessarily involves linedrawing in determining when a dissenter's rights of religious freedom are infringed by the state:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id. (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 308 (1963)).

58. Justice Blackmun's concurring opinion was joined by Stevens and O'Connor, J.J.

59. *Lee*, 112 S. Ct. at 2662.

60. *Id.*

61. *Id.* (quoting Everson v. Board of Educ., 330 U.S. at 31-32). Subsequently in *Lee*, Justice Blackmun expanded on this concept:

> We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is a fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause.

Id. at 2667. Actually, this broad interpretation of separation of religion from politics has, naturally, received support from even the ardent conservatives on the Court. In reference to the Establishment Clause, Justice Rehnquist wrote in his dissent in Engel v. Vitale:

> They knew rather that it was written to quiet well-justified fears which

with this misconception, Blackmun readily applied a test patently balanced in favor of finding an Establishment Clause violation.

In his analysis of the facts of *Lee v. Weisman*, Justice Blackmun applied the maligned *Lemon* test. Not surprisingly, he determined that the prayers did not satisfy the religiously-hostile *Lemon* test; accordingly, Blackmun concluded that they were violative of the Establishment Clause.[62]

Although apparently unnecessary to his resolution of the case, Justice Blackmun also addressed the necessity of coercion in Establishment Clause analysis. He concluded that "[o]ur decisions have gone beyond prohibiting coercion, however, because the Court has recognized that 'the fullest possible scope of religious liberty' entails more than freedom from coercion."[63] Accordingly, Blackmun's sole disagreement with Justice Kennedy's reasoning is that Kennedy requires that coercion be present and Blackmun does not.[64] Blackmun stated that "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient."[65] "Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion."[66] Therefore, Kennedy's narrower coercion analysis conveniently fits within Blackmun's broad ban on religious activity of any kind where the government is involved; in essence, Kennedy's "coercion" analysis is merely a subset of Blackmun's understanding of the Establishment Clause.

> nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to.

370 U.S. 421, 435 (1962). Therefore, Blackmun's recognition of this broad separation of church and state principle is surely universally agreed upon; however, Justice Blackmun errs in applying it as dispositive, black letter law instead of properly using it as a guiding principle.

62. *Id.* at 2664 (Although not couched in the terms of the three-prong *Lemon* test, Blackmun stated that he was applying the *Lemon* test to the *Lee* facts. He found the prayers to be a religious activity. Further, he found the government to be promoting and advancing religion because the government essentially composed the prayers by selecting the clergyman, having the prayer read at a school function and by pressuring students to attend and participate in the prayer.).

63. *Id.* at 2665 (quoting Abington School Dist. v. Schempp, 374 U.S. at 305 (Goldberg, J., concurring)).

64. This distinction between the two justices is exemplified by Blackmun: "To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform." *Id.* at 2667.

65. *Id.* at 2664.

66. *Id.*

The weakness of Justice Blackmun's discordance of coercion as a necessary element stems from the fact that he fails to recognize "indirect" coercion as distinct from "direct" coercion. Justice Kennedy exposed Blackmun's misconception in his dissent in *County of Allegheny v. ACLU*,[67] where he explained that some recent cases have rejected the view that coercion is the sole touchstone of an Establishment Clause violation; however, those cases fail to distinguish between "direct" and "indirect" coercion.[68] Therefore, the precedent upon which Blackmun rests his reasoning is unpersuasive because those cases dealt only with "direct" coercion and were silent with respect to "indirect" coercion. When the coercion element is properly understood to encompass both "direct" and "indirect" forms of coercion, the cases that Blackmun cites as authority for his proposition that coercion is not an essential element embody little more than illusory precedent.

D. Justice Souter's Concurring Opinion[69]

Justice Souter's concurring opinion dealt primarily with two issues: first, whether the Establishment Clause applies to governmental practices that do not favor one religion over another, and, second, whether coercion of religious conformity is a necessary element of an Establishment Clause violation.[70]

In the resolution of his first issue, Justice Souter relied on what he considered to be long-standing precedent; namely, that "the Establishment Clause forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'"[71] Therefore, Souter, like Justice Blackmun, maintains that the Establishment Clause forbids government practices that favor religion broadly, regardless of whether any particular religious denomination or denominations is specifically favored.[72]

However, more troubling is Justice Souter's determination that coercion is not an essential element for an Establishment Clause violation. While acknowledging that the argument in favor of the coercion element has considerable viability, Souter dismisses it on the basis that "[o]ur

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67. 109 S. Ct. 3086 (1989).

68. *Id.* at 3137. Justice Kennedy accurately pointed out that "direct" coercion need not always be shown to establish an Establishment Clause violation; however, "indirect" coercion, although not identified or discussed as such, has been present in the cases that Blackmun relies on for his assertion.

69. Justice Souter's concurring opinion was joined by Stevens and O'Connor, J.J.

70. *Lee*, 112 S. Ct. at 2667.

71. *Id.* (quoting Everson v. Board of Educ., 330 U.S. 1, 15 (1947)).

72. *See* Engel v. Vitale, 370 U.S. 421 (1962) and Wallace v. Jaffree, 472 U.S. 38 (1984) for support of this reasoning.

precedents . . . simply cannot . . . support the position that a showing of coercion is necessary to a successful Establishment Clause claim."[73] Seemingly then, Justice Souter joins Justice Blackmun aboard the same misguided vessel of precedent in dismissing coercion as an essential element of an Establishment Clause violation.

Souter also dismisses coercion as a necessary element of an Establishment Clause violation on the reasoning that to find otherwise would be inconsistent with the wording of the First Amendment. He supported such an interpretation by stating:

> While [Justice Kennedy] insist[s] that the prohibition extends only to the "coercive" features and incidents of establishment, [he] cannot easily square that claim with the constitutional text. The First Amendment forbids not just laws "respecting an establishment of religion," but also those "prohibiting the free

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73. *Lee*, 112 S. Ct. at 2672. Justice Souter relies heavily on the following cases for support that any endorsement or promoting of religion by a government practice is sufficient for an Establishment Clause violation, regardless of whether coercion is found to exist:

County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (The prominent display of a nativity scene on public property, without contesting the dissent's observation that the creche coerced no one into accepting or supporting whatever message it proclaimed, was forbidden by the Court because it was found to be an unconstitutional state endorsement of Christianity.);

Wallace, 472 U.S. at 61 (The Court struck down a state law requiring a moment of silence in public classrooms not because the state coerced students to participate in prayer, but because the manner of its enactment "convey[ed] a message of state approval of prayer activities in the public schools.");

Engel, 370 U.S. at 431 ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that.");

Epperson v. Arkansas, 393 U.S. 97 (1968) (The Court invalidated a state law that barred the teaching of Darwin's theory of evolution because, even though the statute obviously did not coerce anyone to support religion or participate in any religious practice, it was enacted for a singularly religious purpose.);

Edwards v. Aguillard, 482 U.S. at 593 (statute requiring instruction in "creation science . . . endorses religion in violation of the First Amendment");

School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 397 (1985) (The Court invalidated a program whereby the state sent public school teachers to parochial schools to instruct students on ostensibly nonreligious matters. While the scheme clearly did not coerce anyone to receive or subsidize religious instruction, it was held invalid because, among other things, "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public.");

Texas Monthly v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (tax exemption benefitting only religious publications "effectively endorses religious belief.") (Blackmun, J., concurring in judgment) (exemption unconstitutional because state "engaged in preferential support for the communication of religious messages.").

> exercise thereof." Yet laws that coerce nonadherents to "support or participate in any religion or its exercise,"[74] would virtually by definition violate their right to religious free exercise. Thus, a literal application of the coercion test would render the Establishment Clause a virtual nullity. . . .[75]

Rather than the "coercion" test, Souter advocates that the dispositive inquiry is whether a government practice endorses or promotes religion generally. He stated "[t]his principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community."[76]

Applying this principle to *Lee*, Justice Souter found, without reference to coercion, that the public school officials, who were armed with the State's authority, conveyed an endorsement of religion to their students; therefore, the prayers were in violation of the Establishment Clause.[77]

Souter's endorsement inquiry, without regard to or discussion of the element of coercion, is flawed in two ways. First, Souter's reliance on precedent for the proposition that coercion is not a necessary element of an Establishment Clause violation is unpersuasive. The *Engel* case[78] is the genesis of the precedential line of cases that Souter relies on; however, *Engel* disposed of the coercion element without precedent, without relevance to the case itself, and without explanation.[79] Second, Souter's contention that government may not favor religion at all is void of historical context and is overtly hostile toward religion in general. Similar reasoning is embodied in the principle that the Establishment Clause does not require government neutrality between religion and irreligion.[80] Justice Rehnquist illuminated the constitutional basis of this principle in *Wallace v. Jaffree* when he stated that "[n]othing in the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized 'endorsement' of prayer."[81] Therefore,

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74. *County of Allegheny*, 109 S. Ct. 3086.

75. *Lee*, 112 S. Ct. at 2676.

76. *Id.* (citing *County of Allegheny*, 109 S. Ct. at 3101).

77. *Id.* at 2678.

78. Engel v. Vitale, 370 U.S. 421 (1962).

79. *See* County of Allegheny v. ACLU, 109 S. Ct. at 3137. *See also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 935-36 (1986).

80. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 106 (1984) (Rehnquist, J., dissenting); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1988); ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES (1964).

81. 472 U.S. 38, 113-14 (1984).

when viewed in the context of a proper understanding of precedent and in historical perspective, Justice Souter's contention that the element of coercion is unnecessary for an Establishment Clause violation becomes little more than empty and unpersuasive reasoning.

E. Justice Scalia's Dissenting Opinion[82]

Justice Scalia's dissenting opinion focused on two primary contentions: first, a government practice must be viewed in light of historical practices and traditions and, second, Justice Kennedy's concept of coercion is overly broad and does not comport with traditional notions of the meaning of coercion.

Scalia explained his first contention by stating that the Establishment Clause must be construed in light of the "[g]overnment policies of accommodation, acknowledgement and support for religion [that] are an accepted part of our political and cultural heritage."[83] "[T]he meaning of the Clause is to be determined by reference to historical practices and understandings."[84] He clarified this general proposition by recognizing that prayer has been a prominent part of governmental ceremonies and, even more specifically, that there has been a long tradition of invocations and benedictions at public-school graduation exercises.[85] Therefore, observing the historical tradition of graduation prayers, Justice Scalia found the prayers not in violation of the Establishment Clause.

More troublesome, however, is Scalia's failure to expand his concept of coercion detailed in his argument in support of his second contention. Justice Scalia defined coercion as follows: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty."[86] Upon applying this narrow concept of coercion to the facts of *Lee*, Scalia found no coercion present because no one was legally coerced to recite the prayers.[87] Central to this conclusion was Scalia's determination that a student's attendance at the graduation ceremony

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82. Justice Scalia's dissenting opinion was joined by Rehnquist, C.J., White and Thomas, J.J.

83. Lee v. Weisman, 112 S. Ct. 2649, 2678 (1992) (quoting County of Allegheny v. ACLU, 109 S. Ct. 3086 (Kennedy, J., concurring in part and dissenting in part)).

84. *Id.*

85. *Id.* at 2679-80. Scalia noted that at the first public high school graduation ceremony in 1868, the students "marched in their best Sunday suits and dresses into a church hall and waited through majestic music and long prayers." *Id.* at 2680.

86. *Id.* at 2683 (emphasis omitted).

87. *Id.* at 2684.

was voluntary.[88] In sum, Scalia reasoned that no coercion was present because the students were not legally required to attend the graduation ceremony. It further appears that Justice Scalia's disposition of the case rested on the notion that the prayers were permissible because a majority of the community wished to make an expression of gratitude to God.[89]

Justice Scalia's reasoning, too, must yield to Justice Kennedy's thoughtful analysis. Although Scalia properly recognized that religious accommodation rooted in traditional practices ought not be invalidated by the Establishment Clause, he failed to distinguish between accommodation and coercion. As Justice Kennedy reasoned, government practices that are pervasive, to the point of creating state-sponsored religious exercise, are precisely the practices forbidden by the Establishment Clause; therefore, the historical tradition of such practices must yield to the protection the Clause affords.[90] Essentially, the disagreement between Scalia and Kennedy in their resolution of *Lee* rests in their understanding of the meaning of coercion; however, Justice Scalia is unrealistic and formalistic in the extreme by denying that coercion exists in the absence of official punishment or compulsion.

The power of Justice Kennedy's expanded concept of coercion is readily apparent when the concept is properly focused on the fact that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[91] It seems an inescapable conclusion that gathering a captive audience is a classic example of coercion, where the concept of voluntary participation is clearly illusory if the cost of avoiding the prayer is to miss one's graduation.

One final observation regarding Justice Scalia's dissenting opinion is that he placed considerable importance in the fact that a majority of the people wished to participate in the recitation of the prayers.[92] However, this consideration lacks any constitutional support and all persuasiveness; further, it demonstrates that Scalia's reasoning and analysis in this case may simply have been molded to reach a desired result. Justice Kennedy placed the importance of the desires of the majority of the

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88. *Id.* Scalia found attendance voluntary because students were not penalized or disciplined for failing to attend. He distinguished this situation from the school prayer cases by noting that attendance at school is not voluntary because truancy is punishable by law.

89. *Id.* at 2686.

90. *Id.* at 2655.

91. *Id.* at 2658. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Westside Community Bd. v. Mergens, 496 U.S. at 261-62 (Kennedy, J., concurring).

92. *See supra* note 89 and accompanying text.

population in proper constitutional context when he observed that "[w]hile in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency [the minority] and rejects the balance urged upon us."[93]

Further, the government asserted that an occasion of this importance required the objector, not the majority, to take action to avoid compromising religious scruples. Kennedy responded by recognizing that the government's theory "turns conventional First Amendment analysis on its head. . . . It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to a state-sponsored religious practice."[94]

F. The Future Value of Lee and the Coercion Element

The precedential value of *Lee* in future Establishment Clause cases is dependent upon Justice Kennedy's interpretation and application of coercion. The four justices joining Kennedy's majority opinion[95] seem eager to find an Establishment Clause violation whenever the government "endorses," "promotes," or even "acknowledges" religion, regardless of the practice's effect. Conversely, the four justices dissenting in *Lee*[96] apply a narrow interpretation of coercion when determining if an Establishment Clause violation exists and, even then, may be unwilling to find a violation if the challenged practice comports with established government traditions. Therefore, the outcome of a future case is likely to turn on Justice Kennedy's analysis of the coercion element.

Justice Scalia criticized Kennedy's interpretation of coercion as being "a boundless, and boundlessly manipulable, test of psychological coercion."[97] However, this criticism is unjustified. Kennedy limited this "psychological coercion" to school-age children and did so with the support of psychology authority.[98] Further, Kennedy recognized that

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93. *Lee*, 112 S. Ct. at 2660 (Kennedy's statement was in response to the government's contention that the prayers were permissible because they were an essential part of the ceremony for many of the people.).

94. *Id.*

95. *See supra* note 35.

96. *See supra* note 82.

97. *Lee*, 112 S. Ct. at 2679 (Scalia contended that Kennedy had not thought out the implications of the coercion test and that this new approach should, if logically applied, prohibit the recitation of the Pledge of Allegiance.).

98. *Id.* at 2659 (Kennedy noted that adolescents are often susceptible to peer pressure and cited to numerous psychology authorities: Clay Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOCIOLOGICAL REV. 385 (June 1963); Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*,

claims by persons whose only complaint is that the government action offends them will not be sufficient for a violation because being offended is different than being coerced.[99] Therefore, it is evident that Kennedy is likely to be thoughtful and practical when determining whether a challenged practice crosses the line from being merely offensive or irritating to being an impermissible form of government coercion of religion.

III. Conclusion

Justice Kennedy's recognition of the centrality of coercion to Establishment Clause analysis leads to a prohibition of government action that has the effect of coercing or altering religious belief or action. Under this new approach, the Court would sustain many worthwhile, traditional practices that it is currently apt to invalidate. The focal point of the coercion test is that government may not undertake to coerce religious conformity, but it can pursue its legitimate purposes even if to do so incidentally recognizes various religions or religion generally. This approach will tolerate a more prominent place for religion in the public sphere; however, it will simultaneously guarantee religious freedom for both the majority and, especially, the minority faiths.

A "coercion" test interpretation will not forever clarify that which previously has been so blurred. The understanding of what constitutes coercion and what does not is likely to invoke considerable debate, as evidenced by Justices Kennedy and Scalia in *Lee*; however, at least attention would be directed to the core question: whether a challenged government practice has the effect of coercing religious conformity.

In *Lee*, it is indisputable that graduation prayer is a traditional, worthwhile practice. However, the fact that dissentors, even if only one student, are in a very real sense coerced to participate in the recitation of prayer and, thereby, compromise their religious values cannot be dismissed as inconsequential. This effect of religious coercion is the very evil the framers of the Establishment Clause of the First Amendment sought to strictly prohibit.

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14 J. of Youth and Adolescence 451 (Dec. 1985); B. Bradford Brown, Donna Rae Clasen & Sue Ann Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents* 22 Developmental Psychology 521 (July 1986)).

99. *See supra* note 57 and accompanying text.

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